# Petition

81-573

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NO. 81-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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David A. Johnson, et al,

*Petitioners,*

v.

The Air Line Pilots in the Service of Northwest Airlines, Inc., as represented by The Air Line Pilots Association, International, and Northwest Airlines, Inc.,

*Respondents.*

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTIONS PRESENTED

This case involves the standard of liability for a union's breach of its duty of fair representation in the process of collective bargaining. The District Court applied a "discrimination" or "hostile discrimination" test *exclusively*, and, finding no union liability, granted summary judgment. The Court of Appeals disapproved of that criteria, but substituted instead a "clear showing of bad faith" standard, *exclusively*; it found no union liability thereunder, and affirmed. Petitioners have consistently asserted the union's conduct on this record was *arbitrary* under the disjunctive tripartite test of "arbitrary, discriminatory, or in bad faith" conduct established in *Vaca v. Sipes*, 386 U.S. 171, 177, 190 (1976); that the union exceeded the "wide range of reasonableness" granted it by *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953); and that it made distinctions among the class of workers it represented which were beyond the allowable "relevant differences" permitted in, and in violation of the procedural safeguards required by, *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 203, 204 (1944). The specific questions presented for review by this petition are:

1. Does a union's statutory duty of fair representation in the process of collective bargaining include the prohibition of arbitrary conduct as a separate and distinct element of the duty?

2. Does a union's statutory duty of fair representation in the process of collective bargaining include an obligation of procedural fairness owed to employees represented by the union but who are ineligible for union membership?

3. Does a union violate its duty of fair representation, under circumstances of burgeoning employment opportunities for bargaining unit employees in which 56 nonmember laid

off pilots would definitely have been recalled to work before their seniority rights expired, when it unilaterally abrogates their contractual recall rights by striking the employer during their recall, continues the strike beyond the expiration date of their recall rights, and then, without giving the affected nonmember pilots any notice or opportunity to be heard, and in consideration of significantly greater monetary benefits for its active members, arbitrarily negotiates a contract which fails to recognize these pilots as members of the class of workers and sanctions the award of jobs they would have performed to 76 new hires?*

*If the instant petition is granted, petitioners intend to raise an additional question: Does a union violate its duty of fair representation in the process of collective bargaining when it fails to protect the membership in the class of workers of an additional 70 nonmember laid off pilots who would have been recalled to replace retirees during the term of the contract?

## PARTIES TO THE PROCEEDING

The names of petitioners are: David A. Johnson, E. Miller Detrick, James E. Lipe, Jr., Donald A. Barthel, Roger W. Brodt, William F. Keller, William G. Barnes, John W. Ardoyno, Marvin R. Springer, II, David C. Butzine, Philip G. Killey, Robert A. Hegstrom, Howard D. Fowler, Richard D. Daniels, Jerry E. Pankonen, Joel M. Warshaw, Douglas J. Oines, Allyn Eaves, Gary W. Vidlock, Dermod F. Norton, James C. Foster, Gary L. Yoakam, Glen W. Vinup, David L. Colwell, Donald E. Love, Thomas L. Stanley, Robert M. Schuehle, George F. Rickey, James J. Johnson, Frank G. Hill, Terry J. Dwyer, David R. Vechinski, Frank A. Miley, Bruce W. Ohland, Michael T. Drew, James D. Larson, Jerome D. Dilling, George H. Suter, James L. Joyner, Robb R. Smith, William G. Ferguson, Russell E. Smith, Sigurd J. Trelstad, Jr., William E. Bartels, Jr., John S. Holmes, Donald A. Fogal, Robert S. Hopewell, and Scott A. Mikkelsen. The following individuals intend to move to intervene as parties plaintiff if the Court directs further proceedings: David W. Bacon, Robert M. Clark, Norbert R. Kerwin, John G. Kuchinski, Robert H. Meyers, Chuck W. Murray, William D. Potterbin, Stephen F. Suby, Michael C. White, Ronald G. Whittaker, J. W. Browning, Raymond O. Haubelt, Jr., and G. J. Wagner.

The respondents are as described in the caption.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Parties to the Proceeding | iii |
| Table of Authorities | vii |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Statute Involved | 2 |
| Statement of the Case | 2 |
| Basis for Federal Jurisdiction | 2 |
| Procedural History: The Complaint | 2 |
| The District Court Decision | 3 |
| The Court of Appeals Affirms on a Different Theory | 3 |
| The Facts | 4 |
| Reasons for Granting the Writ | 11 |
| I. The decision below conflicts with this Court's holding that the avoidance of arbitrariness is a separate and distinct element of the duty of fair representation, and with decisions of other Courts of Appeals applying that standard to a union's conduct in the process of collective bargaining | 12 |
| II. The decision below conflicts with decisions of this Court and other Courts of Appeals concerning the requirement of procedural fairness as an element of the duty of fair representation | 17 |
| III. The decision below immunizes union conduct which is intolerably unreasonable, not predicated upon "relevant differences" among the class of workers represented, and destructive of fair representation principles established by this Court | 20 |

Conclusion ..... 24

Appendix A Opinion of the Court of Appeals, dated May 28, 1981 ..... 1a

Appendix B Judgment of the Court of Appeals, dated May 28, 1981 ..... 9a

Appendix C Order of the Court of Appeals denying petition for rehearing, dated June 24, 1981 . 10a

Appendix D Memorandum Order of District Court, dated June 5, 1980, with stipulation of facts annexed ..... 11a

Appendix E Statutory provisions ..... 41a

## TABLE OF AUTHORITIES

**Cases** **Page**

*Alvey v. General Electric Co.*, 622 F.2d 1279 (7th Cir. 1980) ..... 14
*Augspurger v. Bhd. of Locomotive Engineers*, 510 F.2d 853 (8th Cir. 1975) ..... 14
*Barton Brands, Ltd. v. NLRB*, 529 F.2d 793 (7th Cir. 1976) ..... 14, 19, 22
*Beriault v. Warehousemen's Union*, 501 F.2d 258 (9th Cir. 1974) ..... 14
*Branch 6000, Nat'l Ass'n of Letter Carriers v. NLRB*, 595 F.2d 808 (D.C. Cir. 1979) ..... 19
*Buchholtz v. Swift & Co.*, 609 F.2d 317 (8th Cir. 1979), cert. denied, 444 U.S. 1018 (1980) ..... 14, 20
*Clayton v. Automobile Workers*, U.S. , 68 L.Ed.2d 538 (1981) ..... 13
*Ekas v. Carling National Breweries, Inc.*, 602 F.2d 664 (4th Cir. 1979) ..... 14
*Electrical Workers v. Foust*, 442 U.S. 42 (1979) . 13, 23
*Emmanuel v. Omaha Carpenters District Council*,535 F.2d 420 (8th Cir. 1976) ..... 14
*Ethier v. U.S. Postal Service*, 590 F.2d 733 (8th Cir.), cert. denied, 444 U.S. 826 (1979) ..... 15n.17
*Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) ..... i, 13, 15, 20
*Goclowski v. Penn Central Transp. Co.*, 571 F.2d 747 (3d Cir. 1977) ..... 14
*Griffin v. Int'l Union, UAW*, 469 F.2d 181 (4th Cir. 1972) ..... 16
*Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) ..... 13
*Jones v. Trans World Airlines, Inc.*, 495 F.2d 790 (2d Cir. 1974) ..... 14, 22
*Mavis v. Bhd. of Ry. Airline & S.S. Clerks*, 585 F.2d 926 (8th Cir. 1978) ..... 14
*Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971) ..... 14

*NLRB v. American Postal Workers Union*, 618 F.2d 1249 (8th Cir. 1980) ..... 15n.17, 19
*NLRB v. Truck Drivers Local 315*, 545 F.2d 1173 (9th Cir. 1976) ..... 14, 19
*Ryan v. Newspaper Printing Pressmen's Union No. 2*, 590 F.2d 451 (2d Cir. 1979) ..... 14
*Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229 (8th Cir.), cert. denied, U.S. , 66 L.Ed.2d 46 (1980) ..... 15n.17, 16
*Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) ..... i, 12, 17, 21
*Teamsters, Local 860 v. NLRB*, F.2d , 107 LRRM 2174 (D.C. Cir. 1981) ..... 14, 19
*Vaca v. Sipes*, 386 U.S. 171 (1967) ..... i, 13
*Waiters Union Local 781 v. Hotel Ass'n*, 498 F.2d 998 (D.C. Cir. 1974) ..... 14
*Williams v. Pacific Maritime Ass'n*, 617 F.2d 1321 (9th Cir. 1980), cert. denied, U.S. , 66 L.Ed.2d 827 (1981) ..... 14

**Miscellaneous**

Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 Tex. L. Rev. 1119 (1973) ..... 15n.17
Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 Minn. L. Rev. 183 (1980) .... 15n.17, 21
Jones, *The Origins of the Concept of the Duty of Fair Representation*, THE DUTY OF FAIR REPRESENTATION 25 (J. McKelvey, ed. 1977) ..... 13, 20
Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 U. Ill. L.F. 35 ..... 15n.17
Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. Pa. L. Rev. 251 (1977) .... 15n.17

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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The petitioners, David A. Johnson, et al, forty-eight former pilots of Northwest Airlines, Inc. represented by the Air Line Pilots Association, International, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered May 28, 1981, which affirmed summary judgments granted by the District Court to both respondents.

## OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-8a) is reported at 650 F.2d 133. The memorandum order of the District Court (App. D, *infra*, 11a-40a) is not reported.

## JURISDICTION

The judgment of the Court of Appeals (App. B, *infra*, 9a) was entered on May 28, 1981. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on June 24, 1981 (App. C, *infra*, 10a). This petition for certiorari was filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. §1254(1).

## STATUTE INVOLVED

The pertinent provisions of the Railway Labor Act, 45 U.S.C. §§151 *et seq.*, made applicable to air carriers and employees by 45 U.S.C. §181, are set forth in App. E, *infra*, 41a-42a.

## STATEMENT OF THE CASE

*Basis for Federal Jurisdiction*

Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §1337, the action being a fair representation dispute arising under the Railway Labor Act, *supra*.

*Procedural History: The Complaint*

Forty-eight petitioners (hereafter plaintiffs) commenced this suit, on behalf of themselves and 133 other former pilots, against their exclusive bargaining agent, Air Line Pilots Association, International (ALPA), and their former employer, Northwest Airlines, Inc. (Northwest), in May 1979. They asserted ALPA violated its duty of fair representation in two

respects: it arbitrarily ignored and abrogated their contractual recall rights by striking the employer precisely when the plaintiffs were being recalled to meet increased operational requirements, thus preventing them from returning to work before their seniority rights expired; and by the form and manner, and improper motivation, with which it ultimately executed an agreement with the airline. Plaintiffs asserted that Northwest was not entitled to take the benefit of a contract with a union which had so breached its duty, and secondly that Northwest had independently discriminated against them by refusing to bargain in good faith with ALPA concerning them. Plaintiffs sought, *first*, compensatory damages from ALPA, and, *second*, a declaration that the contract between ALPA and Northwest was invalid to the extent it eliminated their jobs and careers and enabled new hires to supplant them, with appropriate equitable relief.

*The District Court Decision*

Following denial of defendants' motions for judgment or dismissal in September 1979, and discovery by plaintiffs, defendants moved for summary judgment in February 1980. The District Court granted both defendants' motions by a memorandum order dated June 5, 1980. It *held*: (1) that ALPA did not *discriminate* against plaintiffs in violation of its duty of fair representation; (2) that Northwest did not have a duty to bargain with ALPA after June 30, 1978 (the contractual expiration date of plaintiffs' seniority and recall rights), because that was not then a mandatory subject of bargaining; and (3) in any event, Northwest did bargain with ALPA on that subject after June 30, 1978. The District Court did not, despite plaintiffs' urging, determine whether ALPA's conduct was arbitrary.

*The Court of Appeals Affirms on a Different Theory*

On appeal, the Court of Appeals for the Eighth Circuit

affirmed the District Court's decision. In doing so, it applied a "somewhat different standard in assessing the union's conduct" toward plaintiffs (650 F.2d at 135) — substituting for the District Court's "hostile discrimination" test a "clear showing of bad faith" standard, which it concluded plaintiffs had failed to meet (*id.*, 136-137). It affirmed the District Court's denial of plaintiffs' claim that Northwest discriminated against them by not bargaining in good faith with ALPA, and did not decide whether the employer could be denied the benefit of the ultimate contract reached because of its determination that the union had not violated its duty of fair representation. The Court of Appeals also did not determine, despite plaintiffs' urging, whether ALPA's conduct was arbitrary.

The only questions which plaintiffs present by this petition are those involving the union's duty of fair representation.

*The Facts*

Plaintiffs, many of whom served in the Vietnam War, were hired as pilots by Northwest in 1969 and 1970. They became members of a pilot bargaining unit represented by ALPA. Each was probationary during the first twelve months of service as a pilot. All the plaintiffs were laid off by Northwest either shortly before, or as a result of, a strike by the Brotherhood of Railway and Airline Clerks (BRAC) against Northwest on July 8, 1970. That strike lasted until December 14, 1970. The collective bargaining agreement between ALPA and Northwest then in effect provided:

> "Seniority shall begin to accrue from the date a pilot is first assigned to air line flying duty and shall continue to accrue during such period of duty.
>
> * * *
>
> "A pilot who has been laid off may retain his accumulated system seniority *** except that seniority rights shall be forfeited after five (5) years of continuous layoff."

Although some of the plaintiffs were close to completing their twelve month probationary period as a pilot, none had actually done so at the time of the BRAC strike.

ALPA does not permit probationary pilots to become active members. None of the plaintiffs was thus entitled to vote on any union decisions affecting his employment.

After their 1969-1971 contract expired, ALPA struck Northwest from June 30, 1972 until October 3, 1972.[1] It took Northwest six months to recover from the effect of this strike, but the fuel crisis in December 1973, and subsequent downturn in business, triggered additional layoffs — the last of which occurred in October 1975. This was the background for defendants' negotiations following expiration of the 1972-1974 contract on July 1, 1974.

Since numerous pilots, including plaintiffs, were still on layoff, ALPA and Northwest agreed in their 1975 negotiations to extend the seniority or recall rights of pilots then on layoff until June 30, 1978. This agreement was reached *before* the two brief ALPA strikes in July and August of 1975, and this subject was *not* a cause of those strikes.[2]

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[1]In pre-strike negotiations, ALPA and Northwest had readily agreed, without extended confrontation or discussion, to extend seniority for recall purposes to 38 pilot-trainees who were laid off in 1970 before being assigned to flying duty (Calvert Dep. 10-12; Hochbrunn Dep. 30-31). This item was *not* a cause of the 1972 ALPA strike. The contract finally signed, dated October 3, 1972, contained a Letter Agreement embodying this understanding.

[2]ALPA initially proposed the extension of the seniority or recall rights of pilots on layoff. Northwest responded on March 27, 1975 with a Letter Agreement proposal extending recall rights to September 30, 1977 (ALPA Ans. to Pltfs' Interrog. #7, R. 27); ALPA countered with an extension to July 2, 1979 (*id.*); and on July 17, 1975, *before the ALPA strike later that day*, ALPA and Northwest did reach agreement, and signed, a Letter Agreement extending the recall rights of laid-off pilots to June 30, 1978 (Stip. ¶37, R. 134; Nyrop Affid. ¶5, R. 214). Negotiations on *other* issues were unsuccessful, however, and ALPA struck Northwest briefly on July 17, 1975. Negotiations resumed later that day, the strike was terminated, another strike occurred on August 4, 1975, but terminated

The 1975 agreement became amendable on July 1, 1977. On that date, 231 pilots, including plaintiffs, were still on layoff. Negotiations began in April 1977 and continued until ALPA struck Northwest on April 29, 1978. ALPA had taken a strike vote in August 1977. Plaintiffs had no right to participate in that decision, and did not do so.

These negotiations took place during a significant and long-awaited expansion by Northwest: it had recalled pilots in the Spring of 1976; its operating revenues for 1976 set a record high; it acquired its first new route authority in seven years from the Civil Aeronautics Board (CAB) in February 1977; it recalled additional pilots in the Spring of 1977, chiefly for inauguration of Chicago-Tokyo nonstop flights in June 1977; it obtained a CAB recommendation in September 1977 awarding new routes to Scandinavia; and its 1977 revenues topped a billion dollars for the first time in its history. In January 1978, President Carter approved the entire CAB recommendation granting Northwest trans-Atlantic route authority, and Northwest promptly developed plans for these services to begin in the Summer of 1978 — the precise start-up date varying from April 29th to June 1st.

It was common knowledge that Northwest would require more pilots to perform these services,[3] and in March 1978 Northwest recalled 50 of the 231 pilots then on layoff (44 of whom accepted). These pilots (the "March recallees") were immediately senior to plaintiffs, and all, like plaintiffs, had been on continuous layoff since the BRAC strike. Their requalification training dates, staggered to avoid a bottleneck in

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two days later and the parties executed a new contract on August 7, 1975 which included the Letter Agreement above mentioned (Stip. ¶¶38-42, R. 134-135; Nyrop Affid., *id.*).

[3]Hochbrunn Dep. 42; Beedem Dep. 40; Love Affid. ¶2(i), R. 270-271.

retraining procedures, were set between March 24 and April 28, 1978.

On April 14 and 21, 1978, Northwest issued recalls to 20 of the plaintiffs (the "April recallees") — all of whom accepted. Their report dates were set for May 5 and May 12, 1978.[4]

*It is undisputed that Northwest intended to recall a total of 100 pilots before June 30, 1978 in order to meet its operational requirements.*[5] This contingent would have been comprised of the 44 March recallees, the 20 April recallees, and an additional 36 plaintiffs — 56 plaintiffs in all.

Contemporaneous with these developments, the National Mediation Board had released ALPA and Northwest from mediation on March 29, 1978, and each was free under the Railway Labor Act to seek self-help on April 29, 1978. Northwest had a $44 million increase on the table; ALPA had some 67 "open issues" unresolved; and the parties were $15 million apart on wages alone. An hour before the strike deadline Northwest offered to continue meaningful negotiations if ALPA postponed the strike for 24 hours. The Northwest offer was spurned: ALPA's Master Executive Council (MEC) unanimously voted to keep the strike deadline at 0001 hours, April 29, 1978, and the strike took place as scheduled.

Plaintiffs had voiced their concerns over *their* situation to ALPA officials before the strike. There is no factual dispute whatsoever that ALPA knew of Northwest's increased pilot requirements; that ALPA knew of the June 30, 1978 deadline by which pilots then on layoff had to return to work upon pain

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[4]The May *13* date in Stip. ¶60, R. 138, should be May 12 (Hochbrunn Dep. 66 & exh. 8).

[5]Hochbrunn Dep. 83:17-85:6 cf. 58:11-59:21. Hochbrunn was Northwest's general manager of flight operations.

of losing all seniority or employment rights; that ALPA knew the pilots then on layoff fervently desired to return; that ALPA knew of the March and April recalls, and that even more pilots would be recalled before the June 30 deadline; that ALPA knew there would be an additional 70 pilots retiring during the 1977-1980 contract term; that ALPA believed that once a recallee reported for requalification training he would break his "continuous layoff" status; that ALPA knew the laid off pilots' *careers* (not merely a particular job benefit) were at stake; that ALPA knew from past experience the calamitous effect of a strike on passenger traffic, with post-settlement delays in recalling even those pilots flying before a strike; that ALPA knew of the frequently intransigent bargaining positions taken by Northwest, including its expressed opposition to extending the laid off pilots' seniority;[6] and that ALPA knew it did not have to strike Northwest on April 29th, but that it was an option, a discretionary matter.

All plaintiffs were told was that *if* ALPA did strike Northwest, ALPA would protect their recall rights in subsequent negotiations. None of the plaintiffs was consulted by any ALPA official, or had any input, respecting the strike decision. In actual fact, plaintiffs' predicament, and their contractual recall rights, were completely ignored. *The question of the timing of the strike, and its impact upon the April recallees*

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[6]Northwest rejected on October 4, 1977 ALPA's initial proposal for indefinite or unlimited recall rights for *all* pilots (not just those then on layoff); Northwest rejected on December 13, 1977 ALPA's October 18th proposal seeking ten year seniority retention from date of layoff for *all* pilots; and Northwest rejected on April 17, 1978 ALPA's proposal of that date seeking a Letter Agreement extending *only the then laid off* pilots' seniority to June 30, 1980 (even though Northwest and ALPA had agreed on April 3, 1978 to extend by six months the probationary period of recalled pilots having less than six months' probation to serve, R. 332-334).

*and other plaintiffs also expecting recalls, was not even discussed by the ALPA decision-makers.*[7]

The strike by ALPA on April 29th caused Northwest to cancel its April recall notices to the 20 plaintiffs. It also caused Northwest to cancel its entire Scandinavian operation, on which it had already expended $600,000 in promotional activities.

Following the strike, Northwest increased its strike-settlement offer from $44 million to $48 million by May 23, 1978. It rejected ALPA's effort in mid-May to secure an extension of plaintiffs' seniority. In June 1978 ALPA secretly acknowledged that the issue of extension of plaintiffs' seniority was *not* prolonging the strike, and that it was prepared to drop the demand.[8] In early July — *after the deadline had passed* — ALPA asserted that from a "political, moral standpoint" it must secure an extension, but Northwest rejected all of ALPA's modified seniority-extension proposals.[9] During these post-

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[7]Beedem, the ALPA MEC chairman, testified (Dep. 20:11-17):

> "Q Did anybody among those present [at the MEC meeting where the strike decision was made] bring up this question of timing of the strike at that moment as it might impact on these furloughed pilots who were confronting a deadline a couple of months down the road of June 30, '78?
>
> "A No.
>
> "Q You don't recall?
>
> "A I recall very clearly and it was not discussed."

The ALPA negotiating committee chairman, who was present at the MEC meeting, agreed: the effect of a strike on the furloughed pilots and their June 30, 1978 cutoff date *was not discussed* (Calvert Dep. 53). The ALPA participants in the strike-decision meeting did discuss, however, pension, wages, other benefits, hours of service, and multiple crew matters (*id.*, 53-54).

[8]Hilsen Affid. ¶2, R. 294-295.

[9]ALPA felt that Northwest's conduct on various issues during post-strike negotiations constituted bad faith bargaining (failure to "exert every reasonable effort"

strike negotiations, ALPA never asked Northwest point-blank what its *quid pro quo* would be for accepting an ALPA extension of seniority request; never discussed with Northwest the airline's obvious need for additional pilots; never made proposals comparable to those it used in its United Air Lines contract, which successfully resolved an identical problem involving the recall of 511 furloughed pilots; and never communicated with plaintiffs to get data or information respecting assertions made by Northwest about their flying activities while on layoff.[10]

On July 24, 1978, the ALPA MEC unanimously decided, *inter alia*, to seek seniority extension *only* for the 20 April recallees. None of the plaintiffs was ever informed of this decision. They had asked the MEC for an opportunity to address it and the negotiating committee if it ever appeared that extension of their seniority was going to be dropped by ALPA, and were told they would be granted this opportunity.[11] They never got that chance, nor, despite requests, did they get an opportunity to talk with William Usery, ALPA's chief negotiator at this time; they were told Usery was too busy to see them.[12]

Even the reduced ALPA seniority extension proposal was unacceptable to Northwest.[13] Ultimately, on August 15, 1978,

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to reach an agreement under the Railway Labor Act, 45 U.S.C. §152, First), and sued Northwest on July 7, 1978 in the U.S. District Court for the Eastern District of New York. The complaint sought injunctive relief against Northwest's continued receipt of Mutual Aid Pact monies from other carriers. Northwest denied the material allegations.

[10]All of the March recallees who returned to work before the April 29 strike passed their requalification training procedures without exception.

[11]Love Affid. ¶2(m), R. 274.

[12]Id., ¶2(n), R. 274.

[13]Northwest's Nyrop told ALPA's Usery on July 29, 1978 that the 20 April recallees "would be back today if not for the pilots' strike — [the] answer is no!" Stip. Supp. R. p. A103.

ALPA accepted a Northwest contract offer of a $51 million increase for the senior 90% of the pilot bargaining unit — the remaining junior 10%, all those in the plaintiff class, had lost their employment. The contract protected the *March* recallees, but not the April recallees or any other plaintiff.

It is undisputed that termination of 10% of a pilot bargaining unit by an airline experiencing growth circumstances is unprecedented.[14]

An ALPA negotiator and contract signator defended ALPA's conduct in these negotiations by asserting that ALPA "had no legal obligation to [the furloughed] pilots — they were never full members."[15]

Northwest hired 76 new pilots in early 1979, including three from the group laid off in 1970 who had secured management jobs with Northwest thereafter.[16]

## REASONS FOR GRANTING THE WRIT

This Petition raises substantial and important questions concerning the standard of fair representation required of a union in the process of collective bargaining. Two principal decisions of this Court, in 1944 and 1953, addressed facets of this specific problem. Later decisions, dealing with the duty of fair representation in the contract administration context (grievance and arbitration), articulated a discrete standard — prohibiting union conduct which was "arbitrary, discriminatory, or in bad faith" — which this Court, by dictum, and numerous Courts of Appeals, by express holdings, have subsequently applied

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[14]Hochbrunn Dep. 106-107.
[15]Nielsen Affid., exh. A, R. 165.
[16]Stip. ¶80, R. 142; Hochbrunn Dep. 88-92.

to all forms of union activity in the negotiation, administration, and enforcement of collective bargaining agreements. The decision below narrowly applied only a "bad faith" test and refused to measure the union's conduct by the standard of "arbitrariness" despite the fact that a majority of Courts of Appeals have used and applied that standard in resolving disputes arising from the collective bargaining process. The decision below also completely ignored the subject of procedural fairness in connection with a union's fair representation obligations. Since the duty of fair representation binds unions uniformly throughout the Nation, under both the Railway Labor Act and the National Labor Relations Act, it is imperative that the standards applied by the courts be uniform so that, as in the instant case, a result permitted in one Circuit is not clearly proscribed in another.

## I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDING THAT THE AVOIDANCE OF ARBITRARINESS IS A SEPARATE AND DISTINCT ELEMENT OF THE DUTY OF FAIR REPRESENTATION, AND WITH DECISIONS OF OTHER COURTS OF APPEALS APPLYING THAT STANDARD TO A UNION'S CONDUCT IN THE PROCESS OF COLLECTIVE BARGAINING.

This Court has confronted the duty of fair representation in the negotiation of collective agreements in two significant cases. In *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) — the seminal decision creating the duty of fair representation — this Court held that in negotiating a collective agreement under the Railway Labor Act, a union must not only act "without hostile discrimination, fairly, impartially,

and in good faith," *id.*, at 204, it must also avoid distinctions not based upon "relevant differences." *Id.* at 203. Indeed, toward that end, the Court imposed certain minimal procedural obligations owed to minority groups adversely affected by the union's action. *Id.* at 204. *See* Point II, *infra*. And in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), this Court upheld a union's negotiation of a seniority provision giving credit for pre-employment military service, noting:

> " *** A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals. *** A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

This "wide range of reasonableness," as one commentator has pointed out, implies a correspondingly narrow area of "intolerable unreasonableness." Jones, *The Origins of the Concept of the Duty of Fair Representation*, THE DUTY OF FAIR REPRESENTATION 25, 34 (J. McKelvey, ed. 1977).

In a subsequent landmark decision dealing with the duty of fair representation in the administration of a contractual grievance procedure, this Court has, citing these negotiation cases, expressly held that the duty prohibits three distinct kinds of union conduct: actions which are arbitrary, discriminatory, *or* in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 177, 190 (1967). See also *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563-564 (1976); *Electrical Workers v. Foust*, 442 U.S. 42, 46-47 (1979); *Clayton v. Automobile Workers*, U.S. , 68 L.Ed.2d 538, n. 24 at 551-52 (1981).

Accordingly, a majority of the Courts of Appeals have rec-

ognized that a union must avoid arbitrary conduct in the process of collective bargaining, and that this is a separate and distinct element of its duty of fair representation. *See Teamsters, Local 860 v. NLRB*, F.2d , 107 LRRM 2174, 2176-2177 (D.C. Cir. 1981); *Waiters Union Local 781 v. Hotel Ass'n*, 498 F.2d 998, 1000 (D.C. Cir. 1974); *Ryan v. Newspaper Printing Pressmen's Union No. 2*, 590 F.2d 451, 455 (2d Cir. 1979); *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 797-798 (2d Cir. 1974); *Goclowski v. Penn Central Transp. Co.*, 571 F.2d 747, 760-61 (3d Cir. 1977); *Ekas v. Carling National Breweries, Inc.*, 602 F.2d 664, 667 (4th Cir. 1979) *(semble)*, *cert. denied*, 444 U.S. 1017 (1980); *Alvey v. General Electric Co.*, 622 F.2d 1279, 1287-89 & n. 8 (7th Cir. 1980); *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798 (7th Cir. 1976); *Williams v. Pacific Maritime Ass'n*, 617 F.2d 1321, 1330 (9th Cir. 1980), *cert. denied*, U.S. , 66 L.Ed.2d 827 (1981); *NLRB v. Truck Drivers Local 315*, 545 F.2d 1173, 1176 (9th Cir. 1976); and *Beriault v. Warehousemen's Union*, 501 F.2d 258, 263-64 (9th Cir. 1974).

The Eighth Circuit, however, has steadfastly *refused* to consider whether arbitrary union conduct in the process of collective bargaining constitutes a violation of the duty of fair representation: it has relied on statements of this Court in the preemption case of *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1971), to require proof of "hostile discrimination," *Mavis v. Bhd. of Ry. Airline & S.S. Clerks*, 585 F.2d 926, 930-31 (8th Cir. 1978); *Augspurger v. Bhd. of Locomotive Engineers*, 510 F.2d 853, 858-59 (8th Cir. 1975); *cf. Emmanuel v. Omaha Carpenters District Council*, 535 F.2d 420, 423 (8th Cir. 1976), or, alternatively, a "bad faith motive," *Buchholtz v. Swift & Co.*, 609 F.2d 317, 327 (8th Cir. 1979),

*cert. denied*, 444 U.S. 1018 (1980).[17] In the instant case, the Eighth Circuit disapproved of the *Lockridge*-based "hostile discrimination" test used by the District Court, but its singular and exclusive "clear showing of bad faith" criterion — adhered to in the face of plaintiffs' persistent contention that they were entitled to measure the union's conduct separately by the test of arbitrariness — is outrageously narrow and impermissible. After all, plaintiffs' discovery had distilled their pleaded claims against ALPA to arbitrary conduct — that, in part, the union *never even exercised its discretion*, and never, in the words of *Ford Motor Co. v. Huffman, supra*, discharged its "major responsibility of *** weigh[ing] the relative advantages and disadvantages" of calling a strike at a time which predictably extinguished 56 plaintiffs' careers *versus* waiting a reasonable period of time (not exceeding sixty days) in deference to their contractual recall rights, and thus permitting their recalls to satisfy Northwest's burgeoning requirements before calling a strike if it was still necessary to do so. See

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[17] In contrast to its rulings in *negotiation* fair representation cases, the Eighth Circuit has recognized the full tripartite standard as the proper standard of liability in cases involving administration of the grievance-arbitration procedure. *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1235-37, 1245 (8th Cir.), *cert. denied*, U.S. , 66 L.Ed.2d 46 (1980); *Ethier v. U.S. Postal Service*, 590 F.2d 733, 737 n. 3 (8th Cir.), *cert. denied*, 444 U.S. 826 (1979); *NLRB v. American Postal Workers Union*, 618 F.2d 1249, 1255 (8th Cir. 1980) — arbitrary conduct alone may suffice to establish a violation of the duty of fair representation.

There is substantial scholarly discussion of whether and to what extent the standards of fair representation should differ in contract negotiation as distinct from the administration of the contractual grievance-arbitration procedure. Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 Minn. L. Rev. 183 (1980); Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 U. Ill. L.F. 35; Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. Pa. L. Rev. 251, 254-58 (1977); Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 Tex. L. Rev. 1119, 1156-60 (1973).

pp. 8-9, n. 7 *supra*.[18]

The Eighth Circuit's failure to apply the standard mandated by this Court is crucial to the summary judgment obtained below. One of the questions presented was whether the union acted arbitrarily in calling a strike at a time when it would have such foreseeable and disastrous consequences to the jobs of 56 plaintiffs. Complete disregard of or indifference to the interests of this minority group, not necessarily amounting to bad faith or hostility, constitutes arbitrary conduct proscribed by the duty of fair representation.

> " *** Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation."

*Griffin v. Int'l Union, UAW*, 469 F.2d 181, 183 (4th Cir. 1972), quoted with approval by the Eighth Circuit in *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229 at 1237. Here, because the standard of fair representation applied by the Eighth Circuit ignored the element of arbitrariness, *no determination was ever made on that critical point*. To grant summary judgment against plaintiffs under these circumstances is so contrary to the standards required by this Court and followed by other Courts of Appeals that summary reversal of the judgment below is clearly warranted.

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[18]The second claim of plaintiffs related to ALPA's post-strike conduct, particularly the distinctions-without-a-difference it made between the March and April recallees, and, indeed, between March recallees and the entire group of 56 plaintiffs who would have timely returned to work but for the union's strike. *See* Point III, *infra*.

## II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS CONCERNING THE REQUIREMENT OF PROCEDURAL FAIRNESS AS AN ELEMENT OF THE DUTY OF FAIR REPRESENTATION.

In *Steele* this Court held that there was a procedural component to the duty of fair representation. The principle of fair representation imposes a duty fairly to represent every member of the bargaining unit, whether or not they are members of the union. In fact, in that case the black firemen who had been discriminated against were ineligible for union membership (just like the plaintiffs here). The Court took pains to make clear that "Wherever necessary to that end" — that is, to the end of fair representation — "the union is required to consider requests of nonunion members of the craft *** with respect to collective bargaining with the employer and *to give to them notice of and opportunity for hearing upon its proposed action.*" 323 U.S. at 204 (emphasis added).

The *only* reference in the decision below to this procedural requirement is that plaintiffs "had several opportunities to present their views to the union," 650 F.2d at 136, an observation which completely ignores the undisputed facts that the union (a) never told any of the plaintiffs before April 29 it intended to strike Northwest on that date, (b) never told any of the plaintiffs of its July 24 proposal seeking seniority extension only for the 20 April recallees, (c) never told any of the plaintiffs of its intention to ultimately agree to protect only the March recallees, and (d) never gave plaintiffs an opportunity for hearing respecting *any* of the three decisions above-described. See pp. 8 and 10, *supra*; Finding ¶20, App. D, *infra*, 17a.

The purpose of the procedural requirement of *Steele* is to

assure a rational decision-making process by a union in its representation of bargaining unit employees who, for whatever valid union reason, are unable to actively and fully participate in its internal affairs. This case forcefully demonstrates the efficacy of such a requirement: the union here would not have failed *to even discuss* (at its strike-decision meeting on April 28) the impact of an April 29 strike upon the 20 plaintiffs set to report on May 5 and May 12 if it had informed them of its proposed action; even a minimal colloquy with these and other plaintiffs about to be recalled would have shown the union its assurance of post-strike "protection" of their recall rights was gratuitous, reckless, and irrational, because the union, alone, had no power to accomplish that result without the consent and agreement of the then strike-ravaged employer, whereas *delaying* the strike produced immediate benefits. Similarly, the patently disruptive effect of even a "short" strike on Northwest's planned recalls — recalls based upon the start of its Scandinavian operations and traditional heavy summer flying schedules — would have been acknowledged.[19] The strike decision, in short, was critical: once a strike occurred, and Northwest's summer operations were disrupted or canceled, plaintiffs' recalls would be entirely dependent upon the acquiescence of an employer which had consistently opposed extension of their recall rights. Had the union given plaintiffs the requisite "opportunity for hearing upon its proposed action," who is to say the result might not have been different? The law, of course, does not require the union to *agree* with the views expressed by nonmembers; but it does, by this procedure, assure that their views and suggestions will be con-

[19]Calvert, the chairman of the union's negotiating committee, admitted that even a one-month strike would have likely prevented *any* recallee from returning to work before June 30, 1978. (Dep. 46)

sidered, weighed, and evaluated so that the union's ultimate judgment is a fair and informed exercise of its discretion. Here, to the contrary, we see the results of noncompliance with the procedural component of fair representation: there is affirmative evidence that the union did not even discuss, much less exercise its discretion about, the impact of the *timing* of the strike upon plaintiffs. It cannot, therefore, exculpate itself from responsibility for its precipitate and callous strike decision because of its post-strike importunities, or the employer's obdurate posturing, on the issue of extension of plaintiffs' recall rights.

Other Courts of Appeals have required unions to adhere to rational decision-making processes, or procedural fairness, in the context of collective bargaining. *See Teamsters, Local 860 v. NLRB*, F.2d , 107 LRRM 2174, 2177 (D.C. Cir. 1981); *Branch 6000, Nat'l Ass'n of Letter Carriers v. NLRB*, 595 F.2d 808, 811 (D.C. Cir. 1979); *NLRB v. Truck Drivers Local 315*, 545 F.2d 1173, 1175 (9th Cir. 1976); and *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798 (7th Cir. 1976). The Eighth Circuit has recognized the appropriateness of this doctrine in the *administration* of a collective bargaining agreement:

> " *** [I]f a union representative makes no effort to communicate with the persons directly affected by its actions and takes action without investigation or adequate notice and opportunity to be heard, these acts and omissions may constitute a breach of the duty of fair representation."

*NLRB v. American Postal Workers Union*, 618 F.2d 1249, 1255 (1980). There is no justification for its failure to apply the identical rule here. The decision below does not honor, but erodes and devitalizes, the procedural component to the duty of fair representation established in *Steele*. Unions, employers affected by union negotiations, and their member-em-

ployees, all require a measure of consistency and predictability in the application of these nationally important principles — which should not vary from one Circuit to another. This Court should review the Eighth Circuit's deviation from *Steele*.

## III. THE DECISION BELOW IMMUNIZES UNION CONDUCT WHICH IS INTOLERABLY UNREASONABLE, NOT PREDICATED UPON "RELEVANT DIFFERENCES" AMONG THE CLASS OF WORKERS REPRESENTED, AND DESTRUCTIVE OF FAIR REPRESENTATION PRINCIPLES ESTABLISHED BY THIS COURT.

The Eighth Circuit's decision affirming the grant of summary judgment in favor of ALPA routinely quoted the "wide range of reasonableness" language from *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), and then specifically based its affirmance "on the union's good faith attempts to represent the conflicting rights of the various groups it represented," 650 F.2d at 137, citing *Buchholtz v. Swift & Co.*, 609 F.2d 317, 327 (8th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980) (reduction in bargaining unit employment due to plant closing). Wholly aside from the deficiencies previously noted, the decision contains no inquiry or analysis of the *boundaries* of *Huffman*, or an examination of this Court's limitation, in *Steele*, of a union's bargaining authority to the making of contractual distinctions based only upon "relevant differences" (323 U.S. at 203).

If *Huffman's* "wide range of reasonableness" leaves only a narrow area of "intolerable unreasonableness," *Jones, op. cit., supra*, p. 13, then the union's conduct in calling a strike in derogation of plaintiffs' *contractual* recall rights (which extended through June 30, 1978) must be examined — to determine whether it was permissible or not, and whether it

was consonant with the union's equal protection obligation under *Steele* (323 U.S. at 202). In calling this strike when it did, the union effectively abrogated and nullified the most important contractual right which plaintiffs possessed (a right, incidentally, totally independent of union or employer concurrence). True, the services of *all* members of the bargaining unit were withdrawn by the strike; *but only the plaintiffs suffered a disparate impact, not shared by the majority*. In effect, plaintiffs' contractual benefits were expropriated by the majority. Such conduct is impermissible, see Finkin, n. 17 *supra*, 64 Minn. L. Rev. at 210, 215, as this Court has already intimated:

> " *** The purpose of providing for a representative is to secure those benefits for those who are represented *and not to deprive them or any of them of the benefits of collective bargaining for the advantage of the representative or those members of the craft who selected it.*"

*Steele*, 323 U.S. at 201 (emphasis added).

In its post-strike negotiations the union ultimately agreed to protect only the seniority of the March recallees — abandoning all the plaintiffs — in exchange for significantly increased benefits for its active members ($51 million vs. $44 million offered at the time of the strike). In fact, there were *no* "relevant differences" between the March and April recallees,[20] or the March recallees and the *other* 36 plaintiffs who would also have been recalled before June 30th, and the

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[20]Both groups were hired in 1969; both had been continuously laid off since the 1970 BRAC strike; there were no material differences in their average ages; and the last contingent of the March recallees reported on April 28 (the day before the strike), with the April recallees to report one and two weeks later.

distinction made between the two groups by the union was quintessentially arbitrary — treating the similarly situated differently. The defense that the union owed "no legal obligation" to the plaintiffs because "they were never full members," p. 11 *supra*, is similarly impermissible, as the Second Circuit stated in *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798 (1974):

> " *** Discrimination in seniority based on nothing else but union membership is arbitrary and invidious and violates the union's duty to represent fairly all members of the bargaining unit."

The plaintiffs were a political minority in the class of workers represented by the union and were *totally* subject to the will and conscience of the majority. They had no recourse to any grievance or arbitration procedure from the union's negotiation decision. The union's duty under these circumstances was clear:

> " *** While a union may make seniority decisions within 'a wide range of reasonableness . . . in serving the interests of the unit it represents,' [citing *Huffman*] such decisions may not be made solely for the benefit of a stronger, more politically favored group over a minority group. To allow such arbitrary decision-making is contrary to the union's duty of fair representation *** ."

*Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798 (7th Cir. 1976).

The decision below permits a union, under circumstances of increased employment opportunities for bargaining unit employees wherein 56 laid off nonmembers would have been recalled to work before their seniority rights expired, to nullify their contractual recall rights, unilaterally, by striking the em-

ployer during their recall; to continue the strike beyond the expiration date of their recall rights, and then, without giving the affected employees any notice or opportunity to be heard, and in consideration of greater monetary benefits for its active members, to negotiate a contract which does not even recognize the employees as members of the class of workers so represented, and permits the award of jobs they would have performed to 76 new hires.

This result conflicts, totally, with the jurisprudence of fair representation created by this Court, a doctrine which serves

> "as a 'bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.' *** Under the doctrine, a union must represent fairly the interests of all bargaining- unit members during the negotiation, administration, and enforcement of collective-bargaining agreements. *** In particular, a union breaches its duty when its conduct is 'arbitrary, discriminatory, or in bad faith' *** ."

*Electrical Workers v. Foust*, 442 U.S. at 47 (1979) (citations omitted).

This Court should not countenance such a misapplication of its controlling decisions. To do so in this vital area of the law, involving millions of employees and innumerable unions and employers, invites greater disarray from that which already exists.[21]

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[21]See 1 BNA Labor Relations Reporter, News and Background Information, August 24, 1981, "ABA on Duty of Fair Representation," 107 LRR 333-334.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1981

APPENDIX A

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 80-1510

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David A. Johnson, et al.,
Appellants,

v.

The Air Line Pilots in the Service of Northwest Airlines, Inc., as represented by The Air Line Pilots Association, International, and Northwest Airlines, Inc.,
Appellees.

Appeal from the United States District Court for the District of Minnesota

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Submitted: April 13, 1981
Filed: May 28, 1981

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Before LAY, Chief Judge, ROSS, Circuit Judge, and VAN PELT, Senior District Judge.*

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*The Honorable Robert Van Pelt, Senior United States District Judge, District of Nebraska, sitting by designation.

ROSS, Circuit Judge.

This is an appeal from summary judgments granted in favor of both defendants, Air Line Pilots Association, International (ALPA) and Northwest Airlines, Inc.

The appellants are a group of former pilot employees of Northwest Airlines who were laid off in 1970 and who have not flown for the airline since that time. The appellants' seniority rights and their rights of recall to pilot status with the airline expired on June 30, 1978, and were not extended in the August 15, 1978 collective bargaining agreement between the union and the airline. They filed suit in the district court[1] seeking to have the agreement held invalid insofar as it had terminated their rights of employment with Northwest Airlines.

The appellants alleged that ALPA, their exclusive bargaining representative, twice breached its duty of fair representation under the Railway Labor Act, 45 U.S.C. §§151 *et seq.*, during the contract negotiations, and that Northwest Airlines refused to bargain in good faith over the issues governing appellants' continued rights of employment. Both defendants moved for summary judgment and the motions were granted in Judge Alsop's Memorandum Order of June 5, 1980.

On appeal, the appellants argue that the district court erred in granting the summary judgments on the basis of an improper standard of liability, and that the court erroneously resolved genuine issues of material fact. We have carefully reviewed the record, the briefs, the arguments of the parties and Judge Alsop's Memorandum Order. Although we apply a somewhat different standard in assessing the union's conduct towards the appellants, we are satisfied that there were no genuine issues of material fact before Judge Alsop and that the defendants were entitled to a judgment as a matter of law. Accordingly,

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[1]The Honorable Donald D. Alsop, United States District Court for the District of Minnesota, Fourth Division.

we affirm the order of the district court.

The factual background of this case, as stipulated by the parties and as set forth in the district court's order, is as follows: The appellants, 181 in all, were hired by Northwest Airlines in 1969 and 1970. By June 30 of 1970, 155 of the pilots had been laid off, for various reasons, before any of them had completed the twelve month probationary period of accumulated service with the airline. Since membership in ALPA was contingent upon the successful completion of the probationary period, none of the appellants ever became an active member of the union. However, 143 of the appellants had completed training and were assigned to flying duty before they were laid off. They were thus entitled to seniority rights under the terms of the collective bargaining agreement then in effect:

> Seniority shall being to accrue from the date a pilot is first assigned to air line flying duty and shall continue to accrue during such period of duty.
>
> * * * *
>
> A pilot who has been laid off may retain his accumulated system seniority *** except that seniority rights shall be forfeited after five (5) years of continuous layoff.

The remaining 38 pilots had not completed training and consequently had not acquired seniority rights.

In July of 1970, another union struck Northwest, causing losses in the airline's passenger traffic. Shortly thereafter, the remaining appellants were laid off. In 1972, when the collective bargaining agreement between ALPA and Northwest expired, ALPA went on strike. A new collective bargaining agreement was signed on October 3, 1972, and a Letter Agreement signed on that same day provided that seniority and recall rights would be granted to the 38 appellants who previously had not acquired those rights.

The 1972 agreement became amendable on July 1, 1974.

None of the appellants had been recalled by that time, and they were within a year of forfeiting their seniority rights. On July 17, 1975, ALPA once again went on strike. An agreement was reached by the parties on August 7, 1975, and an accompanying Letter Agreement provided that the seniority and recall rights of the appellants would be extended beyond the five year period until June 30, 1978. Northwest had requested a proviso in the Letter Agreement that no further extensions would be requested, but ALPA refused to accept it.

The 1975 agreement became amendable on July 1, 1977. At that time, 231 pilots, including all of the appellants, were still on layoff status. Negotiations began in April of 1977 and continued for approximately a year until ALPA struck the airline on April 29, 1978.

During the year of prestrike negotiations, ALPA sought extension of the appellants' seniority rights on several occasions. The union's first written proposals included one which would have provided indefinite recall rights for the pilots on layoff status, and this proposal was raised at a negotiating session on October 4, 1977. Northwest discussed the proposal but cited several reasons for rejecting it. At a session on October 18, 1977, ALPA proposed that the seniority rights be altered to provide ten years of seniority retention rather than five. This proposal was discussed at negotiating sessions on December 13, 1977, and April 17, 1978, but Northwest ultimately rejected it.

Prior to ALPA's April 29, 1978 strike, several of the 231 pilots were recalled from layoff status by the airline. In March of 1978, 50 pilots were recalled whose rights were senior to those of the appellants. On April 14 and 21, 1978, recall notices were sent to 20 of the appellants. Several more pilots could have expected recall notices, appellants argue, due to requirements for the replacement of retiring pilots and con-

templated increases in the airline's flight service. The April 29 strike prevented any additional recalls, however, and also caused Northwest to cancel the April 14 and 21 notices.

Following the strike, ALPA continued to demand an extension of the appellants' recall rights, and Northwest continued to reject the proposals. ALPA raised the issue several times in May and June, and again in July and August, after the appellants' seniority rights had expired. Modifications of the proposal were offered by ALPA and Northwest but none proved satisfactory. The August 15 agreement contained no extension of the appellants' employment rights.

In their complaint, the appellants charge ALPA with two separate breaches of its duty of fair representation. The first is in the union's decision to strike at a time of increased employment opportunities; the second breach is in the form and manner of the final agreement and the motivation of the union in adopting it. The appellants also argue that Northwest is not entitled to take the benefit of a contract with a union which has breached its duty of fair representation, and that the airline refused to bargain in good faith over the issues affecting appellants' employment rights.

Judge Alsop found no evidence supporting the appellants' unfair representation claims. First, even though ALPA officials were aware that further pilot recalls were imminent and that the appellants' seniority was nearing expiration, the appellants' allegations concerning ALPA's decision to strike were found to be "conclusory" and without "any supporting facts which show[ed] ALPA's lack of good faith." The court pointed out that two prior strikes had actually benefited the appellants and that the 1975 extension of their recall rights had taken place after some of the appellants' rights had already expired. Moreover, even in light of the increased employment opportunities, Judge Alsop found "no evidence suggesting that the decision

to strike was made by ALPA in order to discriminate against the plaintiffs."

Second, Judge Alsop found that the union had not breached its duty to the appellants in its negotiations with Northwest or in its final acceptance of the August 15 bargaining agreement. The court's factual conclusions clearly indicate that the appellants had several opportunities to present their views to the union, and it is obvious that the union made a good faith attempt to keep the recall issue open throughout the negotiations. Finally, Judge Alsop found no improper motive in the union's acceptance of the final agreement:

> There is nothing in the record which indicates that ALPA agreed to the contract settlement because it desired to discriminate or injure the plaintiffs. ALPA clearly had nothing to gain by its failure to obtain plaintiffs' recall rights, except to the extent that its other pilots were benefited by the agreement. "Absent a showing of hostile discrimination, there is no breach of the duty of fair representation merely because the negotiated agreement fails to satisfy all persons represented by the union." *Jackson v. Trans World Airlines*, 457 F.2d 202 at 204 (2nd Cir. 1972). *Accord, Mavis v. Brotherhood of Ry. Airline & SS Clerks*, 585 F.2d 926 (8th Cir. 1978).

We agree with Judge Alsop that ALPA did not breach the duty of fair representation owed to the appellants. We disagree with Judge Alsop's decision, however, to the extent that portions of it are seemingly premised on the fact that the appellants failed to establish "hostile discrimination" on the part of the union. The Supreme Court has long held the view that a union has wide discretion in its representation of the bargaining unit and that a union which is acting in good faith will not be held in breach of its duty of fair representation simply because some parties are disadvantaged by its actions:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

*Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

Under the facts of this case, we affirm the granting of the summary judgment in favor of ALPA on the basis of the union's good faith attempts to represent the conflicting rights of the various groups it represented. Where a union must negotiate meritorious but conflicting claims, "and no clear showing has been made of bad faith in making a choice between [two or more] claims, it can not be said that in making the choice it made, the union unfairly represented one group."[2]

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[2]Although the petition for rehearing en banc was denied in *Buchholtz v. Swift & Co.*, 609 F.2d 317 (8th Cir. 1979), two members of this court dissented and two others filed an opinion concurring with this alternate holding concerning the union's good faith settlement of conflicting claims:

> As long as conflicting claims of various groups of employees are arguably meritorious, we must permit the union and the company to negotiate a settlement of the claims or submit them to arbitration; and when they have negotiated a settlement of all claims in good faith, then we cannot entertain an employee's action in federal court to recover for an alleged breach of contract with respect to the settled claims. To do so would be contrary to established labor policy. *See Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965); *Smith v. Evening News Assn.*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953).
>
> Of course, the one exception to the rule is where bad faith has been clearly shown. That is not the case here.
>
> Id. at 328.

*Buchholtz v. Swift & Co.*, 609 F.2d 317, 327 (8th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980). Accordingly, we reject appellants' arguments that the granting of summary judgment in favor of ALPA was improper.

We have also considered appellants' challenges to the district court's granting of a summary judgment in favor of Northwest Airlines, and find them to be without merit. Since we have determined that ALPA did not breach its duty of fair representation, we need not address the issue of whether the airline may be deprived of the benefit of the contract on the basis of the union's alleged breach of duty. Finally, we reject the claim that Judge Alsop improperly resolved genuine issues of material fact as to Northwest's duty to bargain with ALPA over the issue of the extension of appellants' seniority rights. The record clearly supports Judge Alsop's conclusions on this issue[3] and we hold that the granting of the summary judgment was proper.

Accordingly, the order of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[3]Judge Alsop set forth his conclusions as follows:

> The court concludes that the plaintiffs were not employees of NWA [Northwest] following June 30, 1978, and that NWA did not have a duty to bargain with ALPA on the issue of extension of plaintiffs' seniority rights since that was not a mandatory subject of bargaining following that date.
>
> However, even if NWA did have a duty to bargain with ALPA regarding extension of plaintiffs' seniority rights following June 30, 1978, the court concludes that NWA did in fact bargain with ALPA on that issue. *** Although NWA was adamant in its desire not to concede on the recall issue, NWA did discuss the merits of the issue several times after June 30, 1978, and NWA did listen and consider the different proposals submitted by ALPA on the recall issue. While the Railway Labor Act requires bargaining, it does not require agreement. *See Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937).

## APPENDIX B

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## JUDGMENT

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

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80-1510 September Term, 1980

David A. Johnson, et al,
Appellants,

vs.

The Air Line Pilots in the Service of Northwest Airlines,
Inc., etc., et al,
Appellees.

Appeal from the United States District Court for the District of Minnesota

Appeal from the United States District Court for the District of Minnesota.

This cause was heard on a designated record from the United States District Court for the District of Minnesota and on briefs of the respective parties and was argued by counsel.

After consideration, it is now ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

May 28, 1981

A True Copy:
ATTEST: s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeal, Eighth Circuit

## APPENDIX C

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## UNITED STATES COURT OF APPEALS
## FOR THE EIGHTH CIRCUIT

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No. 80-1510 September Term, 1980

David A. Johnson, et al.,
Appellants,

vs.

The Air Line Pilots in the Service of Northwest Airlines, Inc., etc., et al.
Appellees.

Appeal from the United States District Court for the District of Minnesota.

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

June 24, 1981

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

DAVID A. JOHNSON, et al,

Plaintiffs,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and NORTHWEST AIRLINES, INC.,

Defendants.

4-79 Civ. 238

*MEMORANDUM ORDER*

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Kelley, Torrison and O'Neill, by JAMES C. O'NEILL, Esq., Saint Paul, Minnesota, appeared for plaintiffs.

Lindquist & Vennum, by JAMES P. McCARTHY, Esq., Minneapolis, Minnesota, and JOHN F. DEPENBROCK, JR., Esq., Washington, D.C., appeared for defendant Air Line Pilots Association, International.

Dorsey, Windhorst, Hannaford, Whitney & Halladay, by ROBERT L. HOBBINS, Esq., Minneapolis, Minnesota, and Poletti, Freidin, Prashker, Feldman & Gartner, by PEYTON H. MOSS, Esq., New York, New York, appeared for defendant Northwest Airlines, Inc.

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This matter comes before the court upon the motion of both defendants for summary judgment pursuant to Rule 56 of the

Fed. R. Civ. P. Briefs were submitted by all parties and oral argument was heard. Upon all the files, records and proceedings herein, the court makes the following:

## FINDINGS OF FACT

1. The court adopts the Stipulation of Facts entered into by the parties and hereby incorporates them into these findings.

2. During the negotiations in 1974, ALPA had initiated a proposal to extend the recall rights of laid-off pilots to July 2, 1979. NWA was opposed to such an extension, but in an effort to avoid a strike, NWA proposed a Letter of Agreement which would extend the seniority of the laid-off pilots through June 30, 1978, with the proviso that no further extensions would be requested in any future negotiations. However, ALPA refused to accept the proviso and NWA eventually agreed to the extension without the proviso.

3. The 1975-77 collective bargaining agreement between the Air Line Pilots Association, International (ALPA) and Northwest Airlines, Inc. (NWA) by its terms became amendable on July 1, 1977. ALPA and NWA commenced negotiations for a new collective bargaining agreement in April, 1977. ALPA's first written proposals were submitted to NWA on March 28, 1977, and contained several hundred proposed changes. NWA had mailed its proposals to ALPA on March 3, 1977, containing substantially fewer proposals. ALPA's opener or initial list of contract proposals included the issue of extension of seniority recall rights for furloughed pilots. ALPA's initial proposal on this matter provided that Section 22(F)(3) was to be deleted, thereby allowing all pilots to have indefinite recall rights by going back to work in order of seniority under Section 23(c). Thus, ALPA sought to amend the contract and eliminate entirely the five-year limitation on recall rights.

4. At a negotiating session on October 4, 1977, NWA submitted a proposal setting forth its position on the extension of recall rights issue. NWA was opposed to ALPA's initial proposal and was unwilling to expand the contractual five-year limit on retention of seniority following layoff and to extend the seniority of the laid-off pilots beyond the June 30, 1978 cutoff date established by the Letter of Agreement dated August 7, 1975, for several reasons. These included the fact that the five-year period of retention was already longer than the seniority retention accorded to most other NWA union-represented employees; extension would subject NWA to renewed ALPA demands for restrictive work rules designed to force recall of laid-off pilots; extension would lead to future ALPA demands for full pension for less than 25 years of flying duty to compensate for layoff time; and extension would hamper NWA in complying with its affirmative action obligations.

5. At a negotiating session on October 18, 1977, ALPA distributed a proposal demanding that Section 22, Seniority, be altered to provide ten years of seniority retention after layoff, instead of the unlimited retention demanded in ALPA's opening proposals.

6. At the December 13, 1977 negotiating session, ALPA's demands for changes in Section 22, Seniority, were reviewed and discussed by NWA and ALPA. Arnold Calvert, Chairman of the ALPA Negotiating Committee, asked NWA to consider extending the June 30, 1978 cutoff date to ten years from the date of layoff, in return for which ALPA would consider agreeing to an extension of the probationary period of recalled pilots. NWA responded that it would consider the proposal, but would probably not change its position on that issue.

7. Extension of seniority for laid-off pilots was next discussed at the April 17, 1978 negotiating session. At that ses-

sion, ALPA withdrew its demand to amend Section 22 and notified NWA that it would negotiate only as to pilots presently on layoff and would handle this matter in a side letter. ALPA then proposed a letter agreement extending the seniority recall rights of the presently laid-off pilots until June 30, 1980. NWA rejected this proposal. ALPA struck NWA on April 29, 1978.

8. Negotiating sessions were then held on May 13, 15 and 17, 1978, at which ALPA continued to demand that NWA agree to extend seniority for presently laid-off pilots to July 1, 1980. NWA responded by offering to withdraw its demand for elimination of the union dues check-off provision if ALPA would withdraw its demand for extension of seniority for laid-off pilots.

9. On June 14 and 23, 1978, the parties again met to identify issues which remained open for bargaining. Extension of seniority for laid-off pilots was one of the six major demands asserted by ALPA which remained open at that time.

10. On June 26, 27 and 30, both sides submitted their package proposals on the remaining open issues. ALPA's proposal reflected its demand that extension of seniority recall rights be through June 30, 1980. NWA's response was that seniority for laid-off pilots would run out on June 30, 1978.

11. On July 8, 1978, a negotiating session took place in which ALPA explained that it must obtain favorable treatment on its extension of seniority recall rights demand and that ALPA was willing to defer the July 1, 1978 pay increase to August 1, 1978, to achieve agreement with NWA on this matter. NWA's response was that seniority for laid-off pilots ran out after June 30, 1978, and NWA did not foresee extension of seniority rights.

12. On July 10, 1978, ALPA again raised the seniority extension issue. NWA responded that it was not persuaded by

ALPA's arguments and that even if agreement could be reached on a date certain for a future cutoff, it would only give the pilots false hope because there would be little likelihood of their recall prior to any date that the parties could agree upon. NWA further stated that compromising this issue would just lead to disenchantment for the laid-off pilots, that it was a question of finality, and that NWA did not wish to be at loggerheads again over this same issue in the future.

Later that day, ALPA proposed that an extension date of June 25, 1980 be set, that ALPA would not reopen the topic in the next contract negotiations, and that the new date apply to all laid-off pilots except 36 who had not made it out of ground training prior to their layoff. NWA responded that only 44 recalls had been issued since 1975 and that it would be impossible to draw a line among the laid-off pilots with any reasonable expectation that any of them would be recalled.

13. On July 11, 1978, ALPA distributed a new package proposal which reduced the demanded seniority extension to March 15, 1980. NWA rejected this proposal as well.

14. On July 23, 1978, a negotiation session was held at which William Usery, a former Secretary of Labor, appeared for the first time as a negotiator on behalf of ALPA. Usery again raised the issue of extension of seniority rights and NWA explained its various reasons for opposition to that extension. ALPA then offered to submit that issue to binding arbitration, but that offer was rejected by NWA.

15. At a negotiation session on July 24, 1978, in an attempt to resolve the extension of seniority issue, NWA offered to allow retention of seniority for all pilots up to 1977 System Seniority No. 1574 who had accepted their March, 1978, recall and had entered retraining prior to the April 29 strike. ALPA then countered that it would accept the proposed resolution

of the issue if NWA would increase the seniority retention number through System Seniority No. 1594. This would have included the 20 laid-off pilots who had received recall notices in April, 1978, but had not reported for retraining before the strike on April 29. NWA responded that it was not willing to go beyond System Seniority No. 1574.

16. On July 28, 1978, Usery again met with NWA officials and again sought to obtain NWA agreement to extend the retention of seniority to the 20 pilots holding System Seniority Nos. 1575-1594. NWA offered to extend seniority to such pilots providing that ALPA would agree to eliminate dues check-off from the union security agreement.

17. NWA would not agree to change its position regarding extension of seniority rights in subsequent meetings and on August 11, 1978, ALPA accepted the outstanding offer of NWA on this issue. On August 15, 1978, a new collective bargaining agreement was signed by the parties. Various Letters of Agreement were also signed on that date, one of which settled the extension of seniority issue by providing that pilots holding 1977 System Seniority Nos. 1525-1574 who had not resigned, been terminated or refused recall, would be deemed to have returned to air line flying duty prior to July 1, 1978. Thus, pilots in this category would be considered as having returned to work on or before June 30, 1978, as required by the prior Letter of Agreement signed by the parties on August 7, 1975.

18. ALPA's decision to strike on the first legal day available to it following release by the National Mediation Board was in accordance with ALPA's prior practice in 1972 and 1975 of striking on the first legal day available to it. In neither of the prior strike situations did it prevent subsequent attainment of ALPA's objectives regarding seniority protection for laid-off pilots.

19. In the spring of 1978, NWA's business prospects were very good and NWA anticipated recalling a number of pilots prior to July, 1978.

20. Since the prolonged nature of the negotiations during 1977-78 suggested the possibility of a strike in 1978, plaintiffs requested ALPA to be mindful of their situation. ALPA representatives acknowledged plaintiffs' concerns, met with plaintiffs' representatives regularly on both a formal and informal basis, and allowed plaintiffs to express their views to union officers and other pilots at various union officers' and general membership meetings. However, ALPA did not inform plaintiffs prior to the signing of the new contract that it intended to accept the outstanding offer of NWA regarding the extension of recall rights.

## CONCLUSIONS OF LAW

1. When considering a motion for summary judgment, all facts must be viewed in the light most favorable to the party opposing the motion and that party is entitled to the benefit of all reasonable inferences to be drawn from the facts. *Robert Johnson Grain Co. v. Chemical Interchange Co.*, 541 F.2d 207 (8th Cir. 1976). Also, the right to judgment must be shown with such clarity as to leave no room for controversy and it must appear that the plaintiffs would not be entitled to recover under any discernible circumstances. *Minnesota Bearing Co. v. White Motor Corp.*, 470 F.2d 1323 (8th Cir. 1973).

2. In order to prevail on a claim of breach of the duty of fair representation, the party must establish that the collective bargaining agent acted in an arbitrary, discriminatory or bad faith manner by adducing substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives. *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971). The fact that some members of a collective

bargaining unit are disadvantaged by the actions of their union does not constitute a breach of the duty of fair representation as long as the union was acting in good faith for a legitimate purpose. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). The plaintiff must establish more than mere errors in judgment or negligence on the part of the collective bargaining representative. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). Finally, a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. *Ford Motor Co. v. Huffman, supra.*

3. Federal law establishes in the union the discretion to select which grievances it shall pursue and which shall be settled or abandoned, just as it permits the union to determine which goals shall be pursued in negotiating a new contract. *Humphrey v. Moore*, 375 U.S. 335 (1964).

The duty of fair representation was not intended to undermine the union's routine exercise of good faith control over the negotiating process. In upholding a union's decision to negotiate a seniority provision which favored those employees with preemployment military service, the U.S. Supreme Court stated:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. *Ford Motor Co. v. Huffman*, 345 U.S. 330 at 338 (1953).

4. Plaintiffs claim that ALPA violated its duty of fair representation owing to them by its decision to strike NWA on April 29, 1978, and by the form and manner and with the

motivation by which it ultimately reached agreement with NWA on August 15, 1978.

5. By deciding to strike NWA on the first legal day available following release by the National Mediation Board, ALPA did not breach its duty of fair representation to the plaintiffs. Plaintiffs have merely set forth conclusory allegations that ALPA discriminated against them in making this decision without establishing any supporting facts which show ALPA's lack of good faith.

6. The fact that ALPA decided to strike NWA on the first legal day available following release by the National Mediation Board does not establish an intent to discriminate against plaintiffs. In fact, ALPA previously struck NWA in the same manner on two prior occasions, both of which resulted in undeniable benefits to plaintiffs. The 1972 agreement provided 38 of the plaintiffs with seniority dates even though they were not entitled to seniority because none of them had been assigned to airline flying duty. The 1975 agreement extended the recall rights of the plaintiffs through June 30, 1978, even though some of the plaintiffs' recall rights had already expired at the time of the agreement due to the five-year contract limitation.

7. Even though ALPA was aware that NWA would probably recall some of the pilots prior to June 30, 1978, ALPA's decision to strike NWA with this knowledge was not a breach of the duty of fair representation. There is no evidence suggesting that the decision to strike was made by ALPA in order to discriminate against the plaintiffs. Indeed, at the time of the strike, there was no guarantee how many pilots, if any, would be recalled by NWA or whether any of the plaintiffs would be among the recalled pilots. Also, since it was impossible for ALPA to predict whether a strike would be successful in protecting plaintiffs' interests, the court is not in a position to

find a breach of the duty of fair representation simply because hindsight now shows that ALPA's tactics were unsuccessful on this issue.

8. Plaintiffs allege that they were not active members of ALPA and consequently had no vote in ALPA's bargaining decisions, including ALPA's decision to strike. However, it is clear that plaintiffs' lack of franchise was due to the application of ALPA's general and uniform rules and not from any particular act of hostility, discrimination or reprisal.

9. Next, plaintiffs allege that they were not given a sufficient opportunity to present their views and that ALPA did not take their views into consideration in its decision to settle the strike. The facts show that plaintiffs were given numerous formal and informal opportunities to express their views on bargaining strategy, both before and during the strike, and to enjoy responsive attention.

10. It is clear that the issue of extension of recall rights for the plaintiffs was one of the main reasons why ALPA struck NWA in the first place. ALPA made numerous concessions in its position on the extension of seniority issue in an attempt to reach an agreement with NWA. The recall issue was one of the major "open" issues throughout the negotiations and was pursued by ALPA until the very end.

There is nothing in the record which indicates that ALPA agreed to the contract settlement because it desired to discriminate or injure the plaintiffs. ALPA clearly had nothing to gain by its failure to obtain plaintiffs' recall rights, except to the extent that its other pilots were benefited by the agreement. "Absent a showing of hostile discrimination, there is no breach of the duty of fair representation merely because the negotiated agreement fails to satisfy all persons represented by the union." *Jackson v. Trans World Airlines*, 457 F.2d 202 at 204 (2nd Cir. 1972). *Accord, Mavis v. Brotherhood of Ry. Airline*

*& SS Clerks*, 585 F.2d 926 (8th Cir. 1978).

The U.S. Supreme Court has stated that:

> We are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals it represents . . . Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance process. *Humphrey v. Moore*, 375 U.S. 335 at 371 (1964).

11. Finally, failure to give the plaintiffs notice and an opportunity to be heard prior to settlement of the strike is not a violation of the duty of fair representation in light of the numerous opportunities given to plaintiffs to express their views to ALPA officials during the course of the negotiations. Also, ALPA does not even submit proposed bargaining agreements to ratification by its active members pursuant to its uniform rules, so plaintiffs were not discriminated against in this regard either.

12. Since the court holds that ALPA did not breach its duty of fair representation to the plaintiffs, it follows that NWA is not liable for this alleged breach either. *Cates v. Trans World Airlines, Inc.*, 561 F.2d 1064 (2nd Cir. 1977); *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944); and *Mavis v. Brotherhood of Ry. Airline & S.S. Clerks*, 585 F.2d 926 (8th Cir. 1978).

13. Plaintiffs' independent claim against NWA is that it discriminated against them by refusing to bargain in good faith with ALPA on the question of extension of plaintiffs' seniority.

Since none of the plaintiffs returned to work for NWA by June 30, 1978, they lost their seniority rights (and their recall rights) as of that date pursuant to the Letter of Agreement of August 7, 1975. Thus, plaintiffs' seniority rights and em-

ployment relationship with NWA were terminated after June 30, 1978.

In *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), the U.S. Supreme Court held that an employer has no duty to bargain with a union with respect to anyone who is not one of the employer's employees and is thus not included in the bargaining unit with respect to which the union is authorized to bargain. *See also NLRB v. Sheet Metal Workers Intern.*, 575 F.2d 394 (2nd Cir. 1978). The court concludes that the plaintiffs were not employees of NWA following June 30, 1978, and that NWA did not have a duty to bargain with ALPA on the issue of extension of plaintiffs' seniority rights since that was not a mandatory subject of bargaining following that date.

14. However, even if NWA did have a duty to bargain with ALPA regarding extension of plaintiffs' seniority rights following June 30, 1978, the court concludes that NWA did in fact bargain with ALPA on that issue. While it is clear that NWA only made one modification of its original position on the recall issue throughout the entire negotiation process, the court is not prepared to find that its actions constituted a refusal to bargain in an attempt to discriminate against plaintiffs. Obviously, an employer has the right to obtain the best deal possible for itself during negotiations and, in a sense, that is always "discrimination" against its employees. Although NWA was adamant in its desire not to concede on the recall issue, NWA did discuss the merits of the issue several times after June 30, 1978, and NWA did listen and consider the different proposals submitted by ALPA on the recall issue. While the Railway Labor Act requires bargaining, it does not require agreement. *See Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937). Finally, an agreement was reached which is an indication that some sort of bargaining process took place.

15. The pleadings, stipulation of facts and affidavits show that there is no genuine issue between the parties as to any material facts and that the defendants are entitled to judgment as a matter of law under Rule 56 of the Fed. R. Civ. P.

Upon the foregoing findings of fact and conclusions of law,

IT IS ORDERED That the motions of the defendants Northwest Airlines, Inc. and Air Line Pilots Association, International for summary judgment be and hereby are granted.

IT IS FURTHER ORDERED That judgment be entered in this action as follows:

> The plaintiffs shall take nothing from the defendants on any of their causes of action and the defendants shall have their costs and disbursements as taxed and allowed.

DATED: June 5, 1980.

/s/ Donald D. Alsop
Donald D. Alsop
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

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DAVID A. JOHNSON,
et al.,
Plaintiffs,
v.
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and NORTHWEST AIRLINES, INC.,
Defendants.

Civil File No. 4-79-238

*STIPULATION OF FACTS*

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IT IS HEREBY STIPULATED AND AGREED, by and between plaintiffs and defendants, through their respective attorneys, that for the purposes of the trial of, or any motions with respect to, this action only there is no dispute between the parties with respect to the following facts:

**The Parties**

1. The forty-eight (48) named plaintiffs were hired as pilots by Northwest Airlines, Inc. (NWA) at various times between July 1969 and March 1970.

2. Approximately one hundred and thirty-three (133) other individuals were also hired as pilots by NWA between the same dates as the named plaintiffs, and the named plaintiffs purport to bring this action on behalf of those individuals also.

3. For purposes of this Stipulation only, the word "plaintiffs" herein shall refer to the one hundred and eighty-one (181) individuals comprising the two pilot groups described in paragraphs 1 and 2, above; provided, however, that this stipulation shall not be deemed to include a stipulation by defendants that any persons other than the 48 named plaintiffs are plaintiffs in this action or that the action is or can be properly maintained as a class action on behalf of any of the individuals described in paragraphs 1 and 2, above.

4. NWA is a carrier by air within the meaning of the Railway Labor Act, 45 U.S.C. §§151, First, and 181, and has it principal office at the Minneapolis-St. Paul International Airport, St. Paul, Minnesota.

5. The Air Line Pilots Association, International (ALPA) is a labor organization within the meaning of the Railway Labor Act, 45 U.S.C. §151, Sixth, which maintains a field office at 8053 East Bloomington Freeway, Bloomington, Minnesota, and its principal office at 1625 Massachusetts Avenue, N.W., Washington, District of Columbia.

6. ALPA represents all pilots employed by NWA and has been recognized by NWA to represent said pilots and to negotiate and conclude collective bargaining agreements with NWA regarding hours, wages, and other terms and conditions of employment of said pilots in accordance with the provisions of the Railway Labor Act.

7. Upon their hire and during the time that they were employed as NWA pilots, plaintiffs were members of a bargaining unit of airline pilots in the service of NWA represented by ALPA.

**The Collective Bargaining Agreements**

8. Within the period material to this action, NWA and ALPA have had four (4) collective bargaining agreements governing the terms and conditions of employment of all pilots employed by NWA. The first was signed June 19, 1969, with a duration from July 1, 1969, through June 30, 1971. The second was signed October 3, 1972, with a duration from November 1, 1972, through July 1, 1974. The third was signed August 7, 1975, with a duration from August 7, 1975, through June 30, 1977. The fourth was signed August 15, 1978, with a duration from July 1, 1977, through June 30, 1980. Each of these agreements (together with their accompanying supplemental and letter agreements) are attached hereto and made an integral part of this Stipulation.

9. Within the period material to this action, each of the collective bargaining agreements between NWA and ALPA has contained provisions with respect to a probationary period for NWA pilots and for the accrual, retention, and forfeiture of seniority by NWA pilots.

10. With respect to a probationary period, each such NWA-ALPA collective bargaining agreement has provided that an NWA pilot shall be on probation during the first 12 months of accumulated service as a pilot (exclusive of the initial training period).

11. With respect to the accrual of seniority, each such collective bargaining agreement provided, insofar as is relevant to this action, as follows:

> "Seniority shall begin to accrue from the date a pilot is first assigned to air line flying duty and shall continue to accrue during such period of duty."

12. With respect to the retention and forfeiture of senior-

ity, each such collective bargaining agreement has provided, in pertinent part, as follows:

> "A pilot who has been laid off may retain his accumulated system seniority . . . except that seniority rights shall be forfeited after five (5) years of continuous layoff" [Section 22 (F)(3) in the three most recent agreements].

**The ALPA Constitution and By-Laws**

13. Under the Constitution and By-Laws of ALPA no pilot who has not completed his probationary period is permitted to be or become an Active Member of ALPA.

14. Only Apprentice membership in ALPA is available to pilots who have not completed their probationary period.

15. No financial obligations are imposed on Apprentice Members of ALPA, nor are Apprentice Members entitled to vote on any union matters or to assume elective office within ALPA.

16. ALPA's Constitution and By-Laws apply to all member pilots on any airline on which ALPA has been recognized as the collective bargaining representative of that airline's pilots.

17. ALPA has been the collective bargaining representative for all NWA pilots since 1940.

**The Status of Plaintiffs on April 12, 1970**

18. By April 12, 1970, 143 of the 181 plaintiffs had completed their pilot training, had been assigned to air line flying duty, and had begun to accrue system seniority.

19. By April 12, 1970, the remaining 38 of the 181 plaintiffs were still engaged in pilot training following their hire, had not been assigned to air line flying duty, and had not begun

to accrue system seniority, nor did they have seniority numbers or seniority dates.

**The Layoffs of Plaintiffs in 1970**

20. Between April 13, 1970 and June 30, 1970, NWA laid off 155 of the 181 plaintiffs as a result of a reduction in pilot requirements due to revision of its equipment programming, a substantial reduction in Military Airlift Command (MAC) operations, a heavy loss of revenue due to the air traffic controllers' "sickout" and a general reduction in revenues.

21. On July 8, 1970, NWA employees represented by the Brotherhood of Railway and Airline Clerks (BRAC) struck NWA, which strike resulted in a substantial shutdown of over 2/3 of NWA's normal operations until December 14, 1970.

22. When the BRAC strike began, the remaining 26 of the 181 plaintiffs were laid off along with most of the remaining more senior pilots on the then current NWA pilot system seniority list.

23. When NWA's operations resumed after settlement of the BRAC strike on December 14, 1970, only a portion of the 1,881 pilots on the then current NWA pilot system seniority list were immediately recalled due to the loss of passenger traffic which invariably accompanies a cessation of operations.

**The Status of Plaintiffs After the 1970 BRAC Strike**

24. None of the plaintiffs was recalled following the above described BRAC strike, and none of the plaintiffs has flown as a pilot for NWA since that 1970 BRAC strike.

25. At all times material to this action, none of the plain-

tiffs had completed his 12-month probationary period as a pilot for NWA.

26. At all times material to this action, none of the plaintiffs had become an Active Member of ALPA.

27. At the time of the 1970 BRAC strike, NWA and ALPA had a collective bargaining agreement effective from July 1, 1969, through June 30, 1971. That agreement contained the probationary and seniority provisions set forth in paragraphs 10, 11 and 12, above.

**The ALPA 1972 Strike; Execution of a New ALPA-NWA Collective Bargaining Agreement; Grant of Seniority Status to Pilot Trainees Laid Off in April, 1970; Post-Strike Events**

28. When the 1969-1971 collective bargaining agreement became amendable on July 1, 1971, negotiations for a new agreement were unsuccessful, and on June 30, 1972, the 31st day after the National Medication Board had released the parties for self-help, ALPA struck NWA. This strike lasted until October 3, 1972, when ALPA and NWA executed a new collective bargaining agreement effective from November 1, 1972, through July 1, 1974.

29. At the time the 1972-1974 collective bargaining agreement was being negotiated, the 38 plaintiffs who were still engaged in pilot training at the time of their layoff on April 13, 1970, still had no seniority because none of them had been assigned to air line flying duty before his layoff.

30. On October 3, 1972, ALPA and NWA entered into a Letter Agreement, subsequently attached to the collective bargaining agreement of that date, which provided in pertinent part as follows:

> "In negotiations leading to the Agreement of this date, it was agreed that seniority for recall purposes would be extended to certain pilots who were previously in pilot training but whose training was suspended in April, 1970 as a result of a reduction in pilot requirements."

Accordingly, seniority dates of March 20, 1970, and March 27, 1970, respectively, were assigned to those 38 plaintiffs who had been in pilot training at the time of their layoff on April 13, 1970, and they obtained contractual recall rights in accordance with that seniority.

31. By April 1973, NWA had recalled all pilots flying immediately prior to the ALPA 1972 strike. There were additional recalls through July, 1973 - attributable to restoration of passenger traffic and an increase in the number of flying hours projected - so that by the end of July 1973 some 1,638 of the 1,871 pilots on the then current pilot system seniority list were flying and 233 pilots (including all the plaintiffs) were on layoff with recall rights.

32. In December 1973 and January 1974, NWA laid off 140 more pilots due to a shortage of fuel.

33. From March through May 1974, NWA recalled 124 of these pilots due to increased fuel availability.

34. None of the plaintiffs was recalled to work as an NWA pilot after the settlement of the ALPA strike on October 3, 1972.

**The 1974-1975 Negotiations; the 1975 ALPA Strikes; Execution of a New ALPA-NWA Collective Bargaining Agreement; Extension of Seniority for Laid-Off Pilots; Post-Strike Events**

35. The 1972-1974 collective bargaining agreement between ALPA and NWA became amendable as of July 1, 1974.

36. In January 1975, due to continued fuel problems and a reduction in passenger bookings, NWA laid off 31 pilots.

37. During the 1974-1975 contract negotiations, ALPA initiated a proposal to extend the recall rights of laid off pilots to July 2, 1979. On July 17, 1975, NWA and ALPA reached agreement to extend the recall rights of presently laid-off pilots through June 30, 1978.

38. Negotiations for a new collective bargaining agreement were unsuccessful and on July 17, 1975, the 31st day after the National Mediation Board had released the parties for self-help, ALPA struck NWA.

39. Negotiations for a new collective bargaining agreement resumed later on July 17, 1975, and the ALPA strike terminated.

40. Negotiations for a new collective bargaining agreement were again unsuccessful, and on August 4, 1975, ALPA again struck NWA.

41. The ALPA strike continued until August 6, 1975, on which date a new collective bargaining agreement was executed effective August 7, 1975, through June 30, 1977.

42. A Letter of Agreement dated August 7, 1975 (the same date as the execution of the 1975-1977 collective bargaining agreement) provided:

> "WHEREAS, Section 22 F. 3. of the collective bargaining agreement between the parties signed October 3, 1972, provides for forfeiture of the system seniority rights of pilots after five (5) years of continuous layoff; and
>
> "WHEREAS, the parties desire to further extend the limitation on duration of layoff to a future date certain for pilot employees on layoff July 1, 1974 who have remained on continuous layoff to the date of signing this Letter of Agreement;

> "NOW, THEREFORE, it is agreed between the parties that such employees shall be permitted to continue in layoff status through June 30, 1978. If not returned to work on or before June 30, 1978, said employees will, effective July 1, 1978 lose all seniority rights."

43. The 1975-1977 collective bargaining agreement between ALPA and NWA continued the provision in the preceding agreements that a pilot's seniority rights shall be forfeited after five (5) years of continuous layoff.

44. In August 1975, after the strike settlement, NWA laid off 24 pilots due to a reduction in scheduled flying. In October 1975 NWA laid off 4 more pilots.

45. At all times material to this action, the October 1975 layoff was the last reduction in force of pilots made by NWA.

46. In April 1976 NWA recalled 10 pilots. In May 1976 NWA recalled an additional 12 pilots. Both recalls were due to projected increased flying.

47. In March 1977 NWA recalled 14 pilots. In April 1977 NWA recalled an additional 41 pilots. Both recalls were attributable to projected increased flying, including the inauguration of Chicago-Tokyo nonstop flights commencing June 8, 1977.

**The Status of Plaintiffs at Commencement of the 1977-1978 Negotiations**

48. When negotiations began between ALPA and NWA for a new collective bargaining agreement in April 1977, there were 231 pilots (including the plaintiffs) who were still on layoff, and who had been on continuous layoff since on or before July 8, 1970.

49. Thirty-eight (38) of these 231 laid-off pilots had not completed their initial training.

50. Each of these 231 pilots, including the plaintiffs, possessed recall rights through June 30, 1978, in accordance with the terms of the Letter Agreement quoted in paragraph 42, above.

**The 1977-1978 Negotiations; the NWA Recalls of March and April, 1978; the ALPA Strike of April 29, 1978; Post-Strike Events; and Execution of a New Collective Bargaining Agreement on August 15, 1978**

51. The negotiations between ALPA and NWA for a collective bargaining agreement to replace the 1975-1977 one which became amendable July 1, 1977, continued beyond that date without agreement.

52. In August 1977, ALPA sent strike ballots to all Active Members, who by an 88.4% margin authorized ALPA's President, subject to the approval of the NWA pilots Master Executive Council (MEC), to initiate a strike of NWA's pilots whenever he deemed it appropriate. This was the only strike ballot taken by ALPA in connection with the April 29, 1978 strike at NWA.

53. As NWA probationary pilots and Apprentice Members (if such) of ALPA, none of the plaintiffs had the right to vote in the strike vote taken in August 1977, described in paragraph 52 above.

54. No agreement having been reached by direct negotiations, mediation sessions between NWA and ALPA began in September 1977 under the jurisdiction of the National Mediation Board.

55. ALPA and NWA came to an impasse in bargaining and meetings were recessed late in January 1978 through February 1978.

56. The National Mediation Board proffered arbitration on March 14, 1978, which on March 15, 1978, ALPA accepted, subject to reaching agreement on the issues to be arbitrated and the arbitrator, but which NWA rejected on March 23, 1978.

57. On March 29, 1978, the National Mediation Board released the parties to seek self-help, if they so wished.

58. In March 1978, NWA issued recall notices to 50 of the 231 pilots then on layoff inviting them to commence retraining for pilot service on stipulated dates between March 24, 1978, and April 28, 1978. The recipients of these recall notices possessed 1977 System Seniority Nos. 1525 through 1574.

59. Forty-four (44) of the pilots so recalled in March 1978 accepted the recall and reported for retraining on or before April 28, 1978; six (6) of the pilots so recalled declined recall.

60. On April 14 and April 21, 1978, NWA issued recall notices to 20 additional pilots (all of whom are among the 181 plaintiffs) then on layoff inviting them to commence retraining for pilot service on certain dates between May 5, 1978, and May 13, 1978. The recipients of these recall notices possessed 1977 System Seniority Nos. 1575 through 1594.

61. The recalls of March and April 1978 described in paragraphs 58-60, above, were attributable to increases in NWA's operational pilot requirements, including the contemplated inauguration of transatlantic flights to three Northern European cities.

62. On April 29, 1978, the 31st day after the National Mediation Board released the parties for self-help, ALPA struck NWA.

63. The ALPA strike caused the immediate cessation of all but supervisory flying operations on NWA.

64. On April 29, 1978, NWA cancelled the recall notices of the 20 laid-off pilots described in paragraph 60, above, none of whom had reported for retraining by that date.

65. June 30, 1978, was the date on which any of the 231 laid-off pilots would lose their seniority and recall rights, according to the Letter Agreement of August 7, 1975, if they had not returned to work on or before that date.

66. Shortly before the ALPA strike began, the Northwest MEC and ALPA's President, after consulting with the Negotiating Committee which was seeking to negotiate a new collective bargaining agreement with NWA, decided to strike NWA on April 29, 1978.

67. As of May 23, 1978, NWA distributed to its pilots and others a statement (a copy of which, without attachments, is attached hereto) in which, among other things, NWA stated (i) that since April 20 it had increased its settlement offer - including cost of wages and benefits - from $44,000,000 to $48,000,000 over a 3-year contract period; (ii) that, after lengthy negotiations, NWA had rejected six ALPA demands; and (iii) that it urged ALPA to continue active negotiations on its five remaining demands, including (1) compensation, (2) increased domestic minimum rest, (3) base period for pension compensation, (4) former flight engineers' pensions, and (5) extension of seniority for laid-off pilots.

68. On August 15, 1978, ALPA and NWA signed a new collective bargaining agreement effective August 15, 1978, through June 30, 1980.

69. At the time of the execution of this 1978-1980 agreement NWA estimated the dollar value of the total benefits provided to its pilots by that agreement, measured in terms of increased costs over those incurred over the period of the preceding agreement, to be approximately $51,000,000.

70. This new collective bargaining agreement continued the provision that seniority rights shall be forfeited after five (5) years of continuous layoff.

71. No provision in this agreement granted the plaintiffs any further extension of their seniority rights which had expired on June 30, 1978.

72. On August 15, 1978, the same date as the execution of the new collective bargaining agreement referred to in paragraphs 68-71, above, ALPA and NWA entered into a Letter of Agreement, dated August 15, 1978, as follows:

> "WHEREAS, as the Letter of Agreement dated August 7, 1975, provided for the forfeiture of the system seniority rights of certain furloughed pilots if they were not returned to work prior to July 1, 1978, and
>
> "WHEREAS, the parties desire to extend the seniority rights of those pilots holding seniority numbers 1525 through 1574 on the 1977 System Seniority List who have not resigned, been terminated or refused recall,
>
> "NOW, THEREFORE, it is agreed between the parties that such pilots shall be deemed to have returned to air line flying duty prior to July 1, 1978, for purposes of Section 22 of the Agreement, and the Letter of Agreement dated August 7, 1975."

73. No similar letter of agreement was made by ALPA and NWA with respect to the 20 pilots who had received recall notices in April 1978 but whose recall notices had been cancelled on April 29, 1978, by NWA when the ALPA strike began.

74. The 50 pilots recalled in March 1978 were hired in 1969 immediately prior to the plaintiffs and, like plaintiffs, all of the 50 pilots recalled in March had been on continuous layoff since their layoff at the time of the BRAC strike in 1970 until, in response to recall notice, 44 of them reported for

retraining for pilot duty on or before April 28, 1978.

75. None of the 20 pilots who had received recall notices in April 1978 which were cancelled on April 29, 1978, reported for retraining for pilot duty on or before June 30, 1978.

76. ALPA's Constitution provides that no collective bargaining agreement executed by a subordinate body, as were all of the collective bargaining agreements between ALPA and NWA up to and including the collective bargaining agreement dated August 15, 1978, can become effective until the agreement has been approved by ALPA's Executive Committee or President and signed by a duly authorized official.

77. Membership ratification of ALPA collective bargaining agreements is expressly prohibited.

78. The August 15, 1978, collective bargaining agreement between ALPA and NWA was approved and signed by ALPA's President, J.J. O'Donnell.

79. Each of the preceding collective bargaining agreements between ALPA and NWA which contained a provision that a pilot's seniority shall be forfeited after 5 years of continuous layoff had also been approved and signed by ALPA's President.

80. On February 9, 1979, NWA authorized the hiring of 80 new pilots, and 76 new pilots have been hired and have started their NWA pilot training since that date.

81. ALPA has inducted a number of the new probationary NWA pilots referred to in paragraph 80, above, as Apprentice Members of ALPA.

82. Despite the requests of various of the plaintiffs, NWA has declined to reinstate or re-employ any of them.

83. Plaintiffs have no contractual remedies to exhaust.

84. Plaintiffs have no internal union remedies to exhaust.

Dated: February 7, 1980

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NORTHWEST AIRLINES, INC.
Minneapolis-St. Paul International Airport
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Office of
THE PRESIDENT May 23, 1978

TO ALL NORTHWEST'S PILOTS:

This letter will be short on words and long on facts.

Since my April 20th letter to you, Northwest Airlines has increased its settlement offer - including cost of wages and benefits - from $44,000,000 to $48,000,000 over a three-year contract period.

In the tables immediately following we have set forth what this offer means to you personally — what you can expect in higher wages, greater fringe benefits and improved working rules. Please review them carefully.

The second set of tables meets ALPA's "parity" argument with hard facts on the favorable position occupied by Northwest Airlines' pilots in wages for each type of aircraft that we operate. In addition, Northwest Airlines offers a "better paying fleet" for you to operate.

In the past few days, and after lengthy negotiation, your company found it necessary to reject finally six of the demands of the ALPA negotiating committee. We have not broken off negotiations and, with those items out of the way, we urge the union to continue active negotiation on their five remaining demands, including (1) compensation, (2) increased domestic minimum rest, (3) base period for pension computation, (4) former flight engineer pensions and (5) extension of seniority for laid off pilots.

We believe this is the only way the parties can proceed to an early contract settlement which will bring this damaging strike to an end.

Sincerely,

s/ M.J. Lapensky
M.J. Lapensky
President

Attachments [omitted]

# APPENDIX E

## Pertinent Statutory Provisions

*45 U.S.C. §152, First*

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

*45 U.S.C. §152, Second*

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

*45 U.S.C. §152, Fourth*

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. ***

*45 U.S.C §181*

All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or

foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of this service.

# Opposition

1

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No. 81-573

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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DAVID A. JOHNSON, *et al.*,
*Petitioners,*

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and NORTHWEST AIRLINES, INC.,
*Respondents.*

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## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS


| | Page |
|---|---|
| COUNTERSTATEMENT OF THE CASE | 1 |
| REASONS WHY THE WRIT SHOULD BE DENIED | 3 |
| 1. The Court of Appeals' decision in no way countenanced arbitrary conduct by the union in performance of its statutory duties | 3 |
| 2. The Court of Appeals did not overlook "procedural fairness" as an element of DFR | 5 |
| CONCLUSION | 6 |


## TABLE OF AUTHORITIES

*Cases*


| | |
|---|---|
| *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953) | 4 |
| *NLRB* v. *American Postal Workers Union*, 618 F.2d 1249 (C.A. 8, 1980) | 4 |
| *Steele* v. *Louisville & N.R.R. Co.*, 323 U.S. 192 (1944) | 5 |
| *Vaca* v. *Sipes*, 386 U.S. 171 (1967) | 3 |


*Statutes*


| | |
|---|---|
| *Railway Labor Act*, 45 U.S.C. 155 First | 2 |

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OCTOBER TERM, 1981

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## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### COUNTERSTATEMENT OF THE CASE

The Court of Appeals' decision in this case represents a routine application of the duty of fair representation which in no way warrants this Court's review. The Petition's assertion of conflict with decisions of this Court and of other courts of appeals are, as shown below, plainly incorrect.

Petitioners' suit alleged that the Air Line Pilots Association breached its duty of fair representation by failing to gain extension of their contractual rights to recall from lay-off status through its negotiations with and strike against Northwest Airlines in 1978. The District Court, in granting summary judgment for ALPA and Northwest Airlines, found a complete lack of evidence of any intent by ALPA to discriminate or injure Petitioners' eligibility for recall to employment (Pet. App.

19a-20a). The Court of Appeals found a similarly complete lack of evidence that ALPA had acted other than in good faith in diligently pressing Petitioners' interests in extension of their seniority-recall rights through its 1978 strike and contract negotiations (Pet. App. 7a).[1]

---

[1] The following facts, drawn from the parties' Stipulation (Pet. App. 24a, *et seq.*) and the District Court's Findings (Pet. App. 12a, *et seq.*), are not disputed by the Petition. This suit was brought on behalf of 181 of 231 pilots who were laid off by NWA in 1970 and remained laid off early in 1978 (Pet. App. 24a-25a, 28a, 32a-34a). ALPA in 1972 had secured a letter agreement according recall rights to 38 of these pilots who had not completed training prior to their layoffs (Pet. App. 29a-30a) and, in 1975, secured a letter agreement extending the period of recall eligibility for the entire group from its 1975 expiration through June 30, 1978 (Pet. App. 31a-32a). In a year of negotiations with NWA which commenced in April 1977, ALPA persistently pressed to have the recall rights of all 231 laid-off pilots extended but NWA adamantly refused all such proposals (Pet. App. 12a-15a). After the failure of mediation efforts by the National Mediation Board and expiration of the statutory 30-day waiting period, 45 U.S.C. 155, First, ALPA initiated a strike on April 29, 1978 (Pet. App. 14a, 34a-35a). As of that date, 50 of the pilots had received recall notices in March; 44 had accepted and had commenced retraining, but had not yet resumed active duty when the strike began (Pet. App. 34a). An additional 20 pilots—these were among the Petitioner group—had received recall notices in April but had not yet started retraining (Pet. App. 34a). Incident to commencement of the strike, NWA cancelled the additional 20 recall notices (Pet. App. 35a).

In negotiations during the strike, ALPA continued to press proposals for extension of the recall rights of all 231 individuals all of which were adamantly rejected (Pet. App. 14a-15a). On July 24, 1978, NWA offered to restore the seniority rights only of those pilots who had started retraining before the strike; ALPA countered that the restoration of seniority rights include also the 20 additional pilots who had received recall notices before the strike but had not yet started retraining (Pet. App. 15a-16a). NWA's final offer, accepted by ALPA on August 11, 1978, limited the restoration of seniority to the pilots who had started retraining in April (Pet. App. 16a).

Petitioners do not dispute that ALPA, in accepting NWA's final offer, believed that no better offer would be forthcoming. Though having failed in its year-long effort and 105-day strike to gain

The Petition—without disputing the foregoing conclusions—asserts that the Court of Appeals erroneously failed to determine whether ALPA was guilty of "arbitrary conduct" and that its decision therefore violated the test established in *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967).

## REASONS WHY THE WRIT SHOULD BE DENIED

### 1. The Court of Appeals' decision in no way countenanced arbitrary conduct by the union in performance of its statutory duties.

The Petition (p. 12, *et seq.*) asserts that the Court of Appeals' decision failed to recognize arbitrariness of a union's conduct as a separate and sufficient basis for demonstrating breach of the duty of fair representation and is therefore contrary to *Vaca* v. *Sipes*, 386 U.S. 171 (1967),[2] and decisions of other courts of appeals holding that violation of a single part of the three-part *Vaca* test amounts to a breach of DFR. (Pet. 13-14).

The conflict suggested by the Petition is illusory. The Petition cites several cases in which the Eighth Circuit itself has recognized and applied the three-part standard of *Vaca* as the proper standard of liability in DFR cases (Pet. 15, n. 17). It asserts incorrectly, however, that the Eighth Circuit has held this test limited to cases involving union administration of the grievance-arbitration procedure and has refused to apply it in other cases in-

---

extension of recall rights for all of the laid-off pilots, ALPA succeeded in gaining restoration of seniority for more than two-thirds of those who had received recall notices prior to the strike and who thus had genuine and realistic prospects of gaining re-employment.

[2] In *Vaca*, the Court held the union obliged:

> ". . . to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, *and to avoid arbitrary conduct.*" 386 U.S. at 177 (emphasis added).

cluding those involving contract negotiations (Pet. 14). Nothing in the Eighth Circuit cases cited by the Petition or in its decision in this case suggests either (1) that the Eighth Circuit tolerates arbitrary union conduct in connection with contract negotiation, or (2) that the Eighth Circuit's recognition of the three-part test of *Vaca* is limited to cases involving administration of the grievance-arbitration procedure. Indeed, *NLRB* v. *American Postal Workers Union*, 618 F.2d 1249, 1255 (C.A. 8, 1980)—a case where the Eighth Circuit explicitly recognized arbitrary conduct as independently sufficient to breach DFR—*was not* a case involving union administration of the grievance-arbitration procedure.

The Eighth Circuit's decision in this case makes plain the Court's view that the action complained of was well within the "wide range of reasonableness [which] must be allowed" *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953) (Pet. App. 7a), and thus *not arbitrary*. The fact that the Court of Appeals did not happen to use the precise words "arbitrary conduct" hardly establishes that its decision was incorrect or warrants this Court's review.[3]

Both the Court of Appeals and the District Court noted that substantial and legitimate reasons existed to justify ALPA's decision to strike when it did and to settle on the terms that it did. Delay of a strike, under the circumstances, would have delayed resolution of disputed contract issues affecting other represented pilots and would

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[3] The third "reason" advanced for granting the Petition (pp. 20, *et seq.*)—though differently stated—amounts to a repetition of the first. The first contention asserts that the Court of Appeals erroneously failed to decide whether the challenged conduct had been "arbitrary" while the third contention asserts that ALPA's conduct exceeded the "wide range of reasonableness" allowed by *Ford Motor Co.* v. *Huffman, supra*; at bottom, both assert ALPA's conduct should be disapproved as "arbitrary".

not necessarily have guaranteed that any additional laid off pilots would have been recalled to active service (Pet. App. 19a). As the District Court noted (Pet. App. 16a, 19a), on prior occasions ALPA struck Northwest on the first legally permissible day without injury, and indeed with benefit, to the Petitioners' recall rights. The decision to settle, as the District Court recognized, reflected the weighing by ALPA of legitimate considerations (Pet. App. 20a). ALPA had been striking for extension of the Petitioners' recall rights, among other objectives, for 105 days and had no reason to expect that NWA's contract offer would improve.

**2. The Court of Appeals did not overlook "procedural fairness" as an element of DFR.**

The Petition claims also that the Court of Appeals' decision is contrary to *Steele* v. *Louisville & N.R.R. Co.*, 323 U.S. 192, 204 (1944), and decisions of other courts of appeals in that it failed to recognize "procedural fairness" as an element of DFR (Pet. 17, *et seq.*) Again, the assertion of conflict is incorrect. The Court of Appeals recited that the District Court's "factual conclusions clearly indicate that the appellants had several opportunities to present their views to the union, and it is obvious that the union made a good faith attempt to keep the recall issue open throughout the negotiations." (Pet. App. 6a).[4] Thus, rather than overlooking Petitioners'

[4] The District Court recited:

> "9. . . plaintiffs allege that they were not given a sufficient opportunity to present their views and that ALPA did not take their views into consideration in its decision to settle the strike. The facts show that plaintiffs were given numerous formal and informal opportunities to express their views on bargaining strategy, both before and during the strike, and to enjoy responsive attention.
>
> * * *
>
> "11. Finally, failure to give the plaintiffs notice and an opportunity to be heard prior to settlement of the strike is not a

claim of procedural unfairness, the Court of Appeals properly concluded that Petitioners' views had been duly heard by ALPA and fully considered.

## CONCLUSION

The Court of Appeals' application of DFR to the facts of this case is fully consistent with this court's prior decisions and those of other courts of appeals. The Petition should be denied.

Respectfully submitted,

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violation of the duty of fair representation in light of the numerous opportunities given to plaintiffs to express their views to ALPA officials during the course of the negotiations. Also, ALPA does not even submit proposed bargaining agreements to ratification by its active members pursuant to its uniform rules, so plaintiffs were not discriminated against in this regard either. (Pet. App. 20a-21a)."

# Opposition

# 2

No. 81-573

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AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

and

NORTHWEST AIRLINES, INC.,

*Respondents.*

## BRIEF OF NORTHWEST AIRLINES, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

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## Rule 28 Subsidiary Statement

Respondent Northwest Airlines, Inc. (NWA) has two wholly-owned subsidiaries, Montana Enterprises, Inc., a Montana corporation, and Affiliated Enterprises, Inc., a Minnesota corporation. Montana Enterprises, Inc. has a wholly-owned subsidiary in Japan known as Tomisato Shoji, Kabushiki Kaisha, formed in 1973. All the above subsidiaries are included in NWA's consolidated financial statement.

## TABLE OF CONTENTS

PAGE

Table of Authorities ..... iv

Preliminary Statement ..... 1

Petitioners' Contentions ..... 2

Argument ..... 3

I. THE EIGHTH CIRCUIT RECOGNIZES ARBITRARY CONDUCT AS A DISCRETE BASIS FOR FINDING A FAILURE OF FAIR REPRESENTATION [answering Pet. Point I, pp. 12-16]. 3

II. THE DECISION BELOW CONSIDERED THE CLAIM OF A LACK OF "PROCEDURAL FAIRNESS" AND FOUND NONE [answering Pet. Point II, pp. 17-20]. ..... 4

III. THE DECISION BELOW DOES NOT MISAPPLY "CONTROLLING DECISIONS" OF THIS COURT BY PERMITTING CONTRACTUAL DISTINCTIONS "NOT PREDICATED UPON RELEVANT DIFFERENCES" AMONG THE REPRESENTED GROUP [answering Pet. Point III, pp. 20-23]. ..... 5

Conclusion ..... 7

## TABLE OF AUTHORITIES

**Cases:** **Page**

*Ford Motor Co.* v. *Huffman*, 345 U.S. 300 (1953).... 3, 5, 6

*NLRB* v. *American Postal Workers Union*, 618 F.2d 1249 (8th Cir. 1980) ..... 3, 4

*Smith* v. *Hussmann Refrigerator Co.*, 619 F.2d 1229 (8th Cir. 1979) ..... 3

*Vaca* v. *Sipes*, 386 U.S. 171 (1967)..... 3

*Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937)..... 6

**Rules:**

Rules of the Supreme Court of the United States

17, 28 U.S.C. Rule 17.1(a), (c)..... 1, 2

22, 28 U.S.C. Rule 22.2..... 2

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# Supreme Court of the United States

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*Respondents.*

## BRIEF OF NORTHWEST AIRLINES, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

### Preliminary Statement

To justify the exercise of this Court's discretion to review the decision of a federal court of appeals, Rule 17 of this Court provides that, in general, the decision must either (a) conflict with a decision of another federal court of appeals on the same matter; (b) so far depart from the accepted and usual course of judicial proceedings, or so far sanction such a departure by a lower court, as to call for an exercise of the Court's power of supervision; or (c) have decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict

with applicable decisions of this Court [28 U.S.C. Rule 17.1(a), (c)]. The petition for a writ of certiorari herein meets none of the above criteria.

In support of that position and in conformity with the provision of Rule 22 of this Court that a brief in opposition to a petition for a writ of certiorari should be "as short as possible" (*id.*, Rule 22.2), respondent Northwest Airlines, Inc. ("NWA") respectfully submits the following:

**Petitioners' Contentions**

Petitioners assert three reasons which, in their opinion, justify review by this Court of the decision below:

I. The decision allegedly conflicts with decisions of this Court and other courts of appeals by allegedly failing to recognize "arbitrary conduct" by a union as a discrete basis for a finding that the union failed in its duty of fair representation (see Pet. Point I, pp. 12-16).*

II. The decision allegedly conflicts with decisions of this Court and of other courts of appeals by allegedly failing to require "procedural fairness" as "an element of the duty of fair representation" (see Pet. Point II, pp. 17-20).

III. The decision allegedly misapplies "controlling decisions" of this Court because it allegedly permits contractual distinctions not predicated upon "relevant differences among the class of workers represented" (see Pet. Point III, pp. 20-23).

None of these alleged reasons has merit or justifies issuance of the requested writ.

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* "Pet. ____" refers to Points and/or pages of the petition for certiorari below.

"Pet. App. ____" refers to pages and/or paragraphs of the respective appendices to the petition.

## ARGUMENT

### I. THE EIGHTH CIRCUIT RECOGNIZES ARBITRARY CONDUCT AS A DISCRETE BASIS FOR FINDING A FAILURE OF FAIR REPRESENTATION BUT THE DECISIONS BELOW FOUND NO ARBITRARY CONDUCT

[answering Pet. Point I, pp. 12-16].

Fully recognizing that this Court has held that a "breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the bargaining unit is arbitrary, discriminatory, *or* in bad faith" [see *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967); Pet., p. 13; emphasis supplied], the Eighth Circuit has specifically acknowledged, in several decisions, that "[a]rbitrary conduct alone may suffice to establish a violation of the duty of fair representation" [*NLRB* v. *American Postal Workers Union*, 618 F.2d 1249, 1255 (8th Cir. 1980); see also *Smith* v. *Hussmann Refrigerator Co.*, 619 F.2d 1229, 1236-1237 (8th Cir. 1979)]. In so doing, that court has also acknowledged that, "[i]n evaluating whether union conduct is so arbitrary as to breach the duty of fair representation, so long as a union exercises its discretion in good faith and with honesty or [*sic*] purpose, a 'wide range of reasonableness must be allowed' [citing *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953)]. Mere negligence, poor judgment or ineptitude are insufficient to establish a breach of the duty of fair representation" (*NLRB* v. *American Postal Workers Union, supra*).

While petitioners maintain that the union's decision to strike when some of the petitioners had real expectations of recall constituted actionable "arbitrary conduct" and that the Eighth Circuit's decision below "ignored" that "arbitrariness" (see Pet., pp. 15-16), the facts do not bear them out. The District Court's decision amply demonstrates that that court did not find the union's strike decision arbitrary either in fact or in law (see Pet., pp. 16a, ¶ 18; 18a-20a, ¶¶ 4-7); and the Court of Appeals concurred (*id.*, pp. 5a-6a). In the face of those findings and the Eighth Circuit's clear acceptance of "arbitrary

conduct" as a basis for finding a failure of fair representation (see citations above), there is no occasion nor need for this Court to review the decision below inasmuch as it already conforms to "the standards required by this Court and followed by other Courts of Appeals" with respect to violations of the duty of fair representation (see Pet., p. 16).

## II. THE DECISION BELOW CONSIDERED THE CLAIM OF A LACK OF "PROCEDURAL FAIRNESS" AND FOUND NONE [answering Pet. Point II, pp. 17-20].

Petitioners' second claim is that the decision below conflicts with decisions of this Court and of other courts of appeals by failing to require the union to provide "procedural fairness" to petitioners in the course of the union's negotiation of a new collective bargaining agreement between NWA and its pilots as represented by the union (see Pet., pp. 17-20). In support of that claim, petitioners assert that the decision below "ignores" the requirement that a union consider the views of minorities, such as petitioners, within the represented group (*ibid.*). Again, the facts show otherwise.

Petitioners themselves acknowledge that the Eighth Circuit recognizes the requirement for communication and consideration of minority views (*id.*, p. 19; see *NLRB* v. *American Postal Workers Union*, *supra*, 618 F.2d 1249, 1255). But they assert that the Court of Appeals's statement that the District Court's factual conclusions clearly indicate that petitioners "had several opportunities to present their views to the union" does not sufficiently encompass the presence of adequate communication and consideration (see Pet., p. 17).

However, the Court of Appeals's sentence was only partially quoted by petitioners. In full, the Court of Appeals said: "The [district] court's factual conclusions clearly indicate that [petitioners] had several opportunities to present their views to the union, and it is obvious that the union made a good faith effort to keep the recall issue open throughout the negotia-

tions" (*compare* Pet. App., p. 6a, *with* Pet., p. 17). This entire sentence, founded upon the specific findings of the District Court detailing those "opportunities" which the Court of Appeals was summarizing and adopting, provides a solid factual basis for the conclusion that there was no absence of "procedural fairness" in the negotiating process within the latitude necessarily allowed a union in accordance with *Ford Motor Co.* v. *Huffman*, *supra*, 354 U.S. 330, 338 (see District Court decision, Pet. App., pp. 17a, ¶ 20; 20a-21a, ¶¶ 8-11; Court of Appeals decision, Pet. App., pp. 5a-7a).

Thus, again, there is no occasion nor need for this Court to review the decision below in order to conform it to prevailing law with which it is already consonant.

## III. THE DECISION BELOW DOES NOT MISAPPLY "CONTROLLING DECISIONS" OF THIS COURT BY PERMITTING CONTRACTUAL DISTINCTIONS "NOT PREDICATED UPON RELEVANT DIFFERENCES" AMONG THE REPRESENTED GROUP [answering Pet. Point III, pp. 20-23].

Though sought to be cloaked in terms of misapplication of controlling decisions of this Court (see Pet., p. 23), petitioners' third claim actually presents nothing more than their disagreement with the facts found by the District Court and adopted by the Court of Appeals (*compare* Pet., pp. 20-23, *with* Pet. App., pp. 12a-17a; 2a-5a). Both the District Court and the Court of Appeals found the union's decision to strike in April and its ultimate decision to conclude an agreement with NWA without an extension of petitioners' seniority to be reasonable as matters of fact and within the latitude permitted unions by this Court (see *ibid.*; and Pet. App. 5a-7a; 18a-21a).

The union's persistent efforts to the very end to obtain seniority renewal for petitioners were, as the Court of Appeals noted, "obvious" (Pet. App., p. 6a), as was NWA's determination not to extend for a further period the already unusual

length of seniority retention which only petitioners (among all NWA's pilots) had theretofore enjoyed (see Pet. App. 3a-4a; 29a-30a, ¶¶ 29-30; 31a-32a, ¶¶ 41-43; 13a-16a, ¶¶ 4,6,9,11,13-15). The union's ultimate inability to get NWA to agree to a further extension of this special seniority retention arrangement, which NWA had no legal obligation to concede [see *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 548 (1937)], hardly qualifies as lack of fair representation.

Finally, petitioners' assertion that there were no "relevant differences" between petitioners and the remaining pilot group, or between petitioners and the 44 laid-off pilots whose seniority was restored, to justify different contractual treatment (see Pet., pp.21-22), is demonstrably untrue. None of petitioners had completed his 12-month probationary period as a pilot for NWA when he was laid off in 1970 nor had any of them flown as a pilot for NWA since that date (Pet. App., pp. 28a-29a, ¶¶ 24-25); all of the remaining pilot group had flown for NWA during at least some of that period. The 44 laid-off pilots whose seniority was restored by the Letter Agreement of August 15, 1978, had been recalled in March 1978 and had reported for retraining on or before April 28, 1978 (*id.*, pp. 34a, ¶¶ 58-59; 36a, ¶¶ 72; none of the petitioners had done so (*id.*, p. 37a, ¶ 75). It was the union's right to make the best agreement it could and to determine priorities among differentiated groups of the body it represented (see *Ford Motor Co.* v. *Huffman*, *supra*, 354 U.S. 330, 338).

No issue within the ambit of the criteria for review by this Court is presented by petitioners' Point III.

## CONCLUSION

The decision below is fully supported by the facts found by the District Court and adopted by the Court of Appeals and is consonant with the law of the duty of fair representation as established by the decisions of this Court. It presents no issues of conflict with other Courts of Appeals nor with decisions of this Court; and it is correct as a matter of fact and law.

Accordingly, the petition for a writ of certiorari should be in all respects denied.

Dated: October 21, 1981

Respectfully submitted,

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# Petitioner's Reply Brief

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No. 81-573

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

David A. Johnson, et al,

*Petitioners,*

vs.

The Air Line Pilots in the Service of Northwest Airlines, Inc., as represented by The Air Line Pilots Association, International, and Northwest Airlines, Inc.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

# REPLY BRIEF IN SUPPORT OF PETITION

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## TABLE OF CONTENTS


Page

Table of Authorities ..... i

Argument:

1. Corrections to the ALPA "Counterstatement of the Case" ..... 1
2. The decision below did not decide whether ALPA's strike decision, under the circumstances presented, constituted arbitrary conduct violative of its fair representation duty ..... 2
3. The decision below ignores this Court's requirement in *Steele* that a union give nonmembers notice of and opportunity for hearing upon its proposed action ..... 4
4. The decision below misapplied controlling decisions of this Court ..... 5

Conclusion ..... 6


## TABLE OF AUTHORITIES

**Cases:**


Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) .....3, 5

NLRB v. American Postal Workers Union, 618 F.2d 1249 (8th Cir. 1980) ..... 4

Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944) .....4, 5

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## REPLY BRIEF IN SUPPORT OF PETITION

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Petitioners submit this reply brief in support of their petition for a writ of certiorari.

## ARGUMENT

The Briefs in Opposition of both respondents, ALPA and Northwest, contain assertions which require correction. Petitioners endeavor to correct them as summarily as possible in the following manner.

### 1. Corrections to the ALPA "Counterstatement of the Case"

A. ALPA Br. 1 grossly mischaracterizes petitioners' suit as alleging that ALPA "breached its duty of fair rep-

resentation by failing to gain extension of their contractual rights to recall from lay-off staus through its negotiations with and strike against Northwest Airlines in 1978." The correct and accurate description of petitioners' claims is found in Pet. 2-3; see also Pet. App. 5a and 18a-19a.

B. ALPA Br. 2 n.1, purporting to state facts contained in the parties' Stipulation (Pet. App. 24a-40a), ignores the fact that the Stipulation represented only the *minimum* statement to which all parties would agree, and fails to consider voluminous facts from other sources (answers to interrogatories, deposition testimony, documents produced by respondents, affidavits, and answers to requests for admission) which are accurately reflected in petitioners' statement of facts (Pet. 4-11).

## 2. The decision below did not decide whether ALPA's strike decision, under the circumstances presented, constituted arbitrary conduct violative of its fair representation duty

Both respondents suggest that the Court of Appeals truly ruled and determined that the union's strike decision was *not* arbitrary, and, hence, there is no conflict between its decision herein and the standards established by this Court and followed by numerous other Courts of Appeals (ALPA Br. 3-5; Northwest Br. 3-4). These assertions are plainly wrong. What the Court did with respect to this precise question was the following:

First, it referred to and repeated the District Court's findings concerning the strike decision, findings which were premised on an inadequate showing of *lack of good faith* and *intention to discriminate* (see Pet. App. 5a-6a, 650 F.2d at 136).

Then (passing over for the moment its treatment of petitioners' *second* claim against ALPA, Pet. App. 6a),

the Court of Appeals expressly disapproved of the "hostile discrimination" test used by the District Court (Pet. App. 6a), and after quoting the "wide range of reasonableness" language from *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), flatly declared (Pet. App. 7a-8a, 650 F.2d at 137):

> "Under the facts of this case, we affirm the granting of summary judgment in favor of ALPA on the basis of the union's good faith attempts to represent the conflicting rights of the various groups it represented. Where a union must negotiate meritorious but conflicting claims, 'and no clear showing has been made of bad faith in making a choice between [two or more] claims, it can not be said that in making the choice it made, the union unfairly represented one group.' *Buchholtz v. Swift & Co.*, 609 F.2d 317, 327 (8th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980). Accordingly, we reject appellants' arguments that the granting of summary judgment in favor of ALPA was improper." (Footnote omitted)

Nowhere in the decision below, or the District Court's opinion, is there any evaluation of the union's strike decision *measured by the standard of arbitrariness*. This is the standard which petitioners asserted ALPA violated—and there was abundant affirmative evidence in the record which supported such a claim (see Pet. 6-9 and n.7). None of this evidence was considered in light of the proper standard. Instead, the Court of Appeals affirmed a grant of summary judgment based on a "clear showing of bad faith" test derived from a plant-closing controversy involving reduced bargaining unit work—the exact opposite of the instant fact situation.

The disparity between the standard applied by the decision below and those followed by other Courts of Ap-

peals which have considered fair representation disputes in the process of collective bargaining (see Pet. 14) is sufficient to warrant this Court's attention. The Eighth Circuit evidently permits arbitrary union conduct in the implementation of strike decisions as long as there is "no clear showing of bad faith" by adversely affected employees—a preposterous result. Unions and their officials must clearly understand that the nature and scope of their responsibilities in the process of bargaining and calling of strikes does not include the prerogative of acting in an arbitrary manner.

### 3. The decision below ignores this Court's requirement in *Steele* that a union give nonmembers notice of and opportunity for hearing upon its proposed action

Respondents each assert that the Court of Appeals considered petitioners' claim of lack of procedural fairness and found it wanting by reason of its observation that petitioners "had several opportunities to present their views to the union" (Pet. App. 6a, 650 F.2d at 136). ALPA Br. 5-6; Northwest Br. 4-5.

Both discussions successfully ignore and avoid the thrust of petitioners' argument: that it is *undisputed* the union did not give petitioners notice of three critical decisions affecting them (Pet. 17); that it is *undisputed* the union did not afford petitioners an opportunity for hearing upon these three decisions (*id.*); that giving petitioners such notice and opportunity for hearing is *required* by this Court's decision in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 204 (1944); that the Eighth Circuit recognized the appropriateness of this principle in *NLRB v. American Postal Workers Union*, 618 F.2d 1249, 1255

(1980); and its failure to apply the rule to the instant case was an impermissible deviation from *Steele*. There is nothing in respondents' discussion of this issue which is remotely responsive to the foregoing assertions.

### 4. The decision below misapplied controlling decisions of this Court

In discussing petitioners' Point III (Pet. 20-23), each of the respondents heavily relies upon the findings and conclusions of the District Court (ALPA Br. 4-5; Northwest Br. 5-6), ignoring the fact that the District Court's conclusions were permeated with erroneous notions of "hostile discrimination" or "discrimination" which the Court of Appeals disavowed (*cf.* Pet. App. 17a-21a *with id.*, 6a).

Neither respondent addresses the Court of Appeals' total lack of examination of the limits of *Huffman's* "wide range of reasonableness" or the disparate impact of the union's strike decision upon petititoners or the expropriation of their contractual benefits by the majority.

Lastly, Northwest misstates petitioners' argument respecting the union's ultimate settlement agreement and the distinctions it made *between the March and April recallees*, or the March recallees *and the other 36 petitioners who* would have been recalled before June 30th. The statement at Northwest Br. 6 that " *** None of petitioners had completed his 12-month probationary period as a pilot for NWA when he was laid off in 1970 nor had any of them flown as a pilot for NWA since that date *** ; all of the remaining pilot group had flown for NWA during at least some of that period" is erroneous and misleading—the fact is that *none* of the March recallees had flown since his 1970 BRAC-strike layoff either (Stip. ¶74 at

Pet. App. 36a), and, furthermore, only the ten most senior pilots in that group of 44 March recallees had completed their probation before being laid off (NWA Ans. to Pltfs' Interrog. #1, R. 89-90; ALPA Ans. to Pltfs' Interrog. #2(e), R. 26). There were, therefore, *no* relevant distinctions between the March and April recallees. or the March recallees and the other 36 petitioners, yet the union agreed to protect one group and not the other.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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